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## International Antitrust

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## International Antitrust

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# International Antitrust

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## I. Developments in Argentina

### A. LEGISLATIVE DEVELOPMENTS

On March 9, 2006, a bill amending Section 1 of Antitrust Law No. 25.156 was introduced in the House of Representatives.<sup>1</sup> The bill proposes amending the law to cover not only practices injuring consumers, but also conduct affecting economic interests of competitors. Also in March 2006, a bill creating an antitrust prosecutor position was introduced in the House of Representatives.<sup>2</sup>

### B. MERGERS

On August 29, 2006, the Secretary of Domestic Trade, relying on the opinion of the Antitrust Commission (Commission), conditionally approved Arcor S.A.'s purchase of 100 percent of the corporate capital of Benvenuto S.A.C.I. (Benvenuto).<sup>3</sup> Both Arcor and Benvenuto are leading food producers in Argentina. The Commission was concerned by the parties' combined market share of almost 47 percent in "industrial and home-made marmalade." The Commission imposed conditions, including limitations on creating new marmalade trademarks and advertising expenditures, a requirement that prices of certain marmalade products be reported to the Secretariat, and a reduction of the term of a non-compete clause with the sellers.

### C. INVESTIGATIONS

In March 2006, the Commission implemented a precautionary measure in its investigation of the meat industry, whereby it ordered Mercado de Liniers S.A., the largest cattle market in Argentina, to adopt all necessary measures to refrain from concerted practices (agreements between consignment companies and purchasers) prior to cattle auctions, or otherwise coordinating supply and demand in the market.<sup>4</sup> The Commission also established a control and monitoring system, whereby it may conduct inspections of marketers without a preliminary notification.

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1. Law No. 25,156, Sept. 10, 1999.

2. La Ley [L.L.] (0893-D-06) (Arg.).

3. Opinion No. 569 (C554), available at <http://www.mecon.gov.ar/cndc/home.htm> (last visited Nov. 9, 2006).

4. Antitrust Commission's investigation proceedings of the cattle market (Liniers), File No. S01:0384564/2005 (C1087), available at [http://www.mecon.gov.ar/cndc/mc\\_mercado\\_liniers.pdf](http://www.mecon.gov.ar/cndc/mc_mercado_liniers.pdf) (last visited Jan. 31, 2007).

## D. ANTITRUST DECISIONS

In early 2006, the Ministry of Health for the province of Chaco filed a complaint with the Commission against the Association of Anesthesiologists of the province of Chaco, alleging that the Association had engaged in anticompetitive conduct by calling a strike to protest the Federal Government's decision to create positions for new interns specializing in anesthesiology.<sup>5</sup> The Commission found this to be an illegal boycott or concerted denial of services and ordered the Association and all anesthesiologists to resume services, and refrain from organizing, encouraging or facilitating the denial of anesthesiology services.

On April 7, 2006, the Supreme Court affirmed the decision of the Federal Court of Appeals in Civil and Commercial Matters (Panel 1) in the matter of Aeroandina/Felix,<sup>6</sup> upholding the Commission's decision to fine the companies approximately US\$60,000 for filing a late merger notice with the Commission.<sup>7</sup>

On August 24, 2006, the Federal Court of Appeals reversed a decision by the Commission to deny Isenbeck's request that the Commission suspend the effects of a merger between the large brewing companies, Quilmes and Brahma.<sup>8</sup> Isenbeck alleged that Quilmes and Brahma failed to comply with the merger conditions imposed by the Commission in 2003, being divestments of brewing plants and trademarks. The Court of Appeals held that the approval of a transaction under the Law is subject to compliance with the Commission's conditions. The Court held that the takeover, which has been suspended since 2003, would not become effective until the Commission's requirements were met, and ordered Quilmes and Brahma to suspend the implementation of the merger.

## II. Developments in Australia

### A. LEGISLATIVE DEVELOPMENTS

#### 1. *Trade Practices Amendment Bill*

On January 1, 2007, the Trade Practices Legislation Amendment Act (No. 1) of 2006<sup>9</sup> amended the Trade Practices Act of 1974 (TPA) with changes expected to come into force early in 2007. The key amendments include: significant strengthening of the corporate and individual penalty and leniency regimes; new procedures for formal merger clearance and authorization; expansion of the joint venture exemption for price fixing and exclusionary provisions (market sharing, collective boycotts and collusive tendering); and collective bargaining notification procedures for small business.

5. La Ley [L.L.] (S0: 80540/2006) (C. 1128) (Arg.).

6. Corte Suprema de Justicia [CSJN], July 4, 2006, "Aeroandina S.A. y Fexis S.A. v. Apel. Resol. Comisión Nacional de Defensa de la Competencia," La Ley [L.L.] (2006) (Arg.), available at [http://www.mecon.gov.ar/cndc/aeroandina\\_fexis\\_0704\\_2006.pdf](http://www.mecon.gov.ar/cndc/aeroandina_fexis_0704_2006.pdf).

7. According to Section 8 of the Antitrust Law, economic concentrations should be notified prior to or within one week after the execution of the agreement.

8. Case No. C.10.355/05, *Cervecería Argentina S.A. Isenbeck's Appeal against Antitrust Commission's Resolution*, Panel III of the Federal Civil and Commercial Court of Appeal, Buenos Aires, Aug. 24, 2006.

9. Trade Practices Legislation Amendment Act (No. 1), 2006 (Austl.) (amending Trade Practices Act, 1974), available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/asmade/bytitle/35CFA305E5D5F195CA25722000110A55?OpenDocument> (last visited Mar. 12, 2007).

## 2. *Trade Practices Amendment (National Access Regime) Act of 2006*

The Trade Practices Amendment (National Access Regime) Act of 2006 (the TPA National Access Regime Act) came into force on October 1, 2006.<sup>10</sup> The Act amends Australia's National Access Regime, which allows parties to seek access to services provided by essential facilities such as airports and railways by way of "declaration." If a service is "declared," the parties may seek independent arbitration, failing agreement, on the terms and conditions for access.

## 3. *Broadcasting Services Amendment (Media Ownership) Act 2006*

The Broadcasting Services Amendment (Media Ownership) Act of 2006<sup>11</sup> commenced on November 4, 2006, and by January 1, 2008, at the latest, will come into force by amending the Broadcasting Services Act 1992 to recast the restrictions on the number of media outlets that a media proprietor can own in one publication or broadcast area and also relax the limits upon foreign ownership of Australian media organizations.

## B. MERGER POLICY—MERGER REVIEW PROCESS GUIDELINES 2006

The Australian Competition and Consumer Commission (ACCC) implemented new Merger Review Process Guidelines 2006<sup>12</sup> (the Process Guidelines) in July 2006, as the result of an internal review by the ACCC of its informal merger clearance processes. The Process Guidelines are intended to refine and expand upon the processes followed by the ACCC when reviewing mergers and acquisitions under Section 50 of the TPA. Key changes include increased guidance on the ACCC's information requirements, an explanation of the ACCC's use of statements of issues, the expansion of information published in the mergers public register, and clarification as to when public competition assessments will be issued.

## C. MISUSE OF MARKET POWER AND PRICE FIXING

Following an en banc decision of the Federal Court in 2003<sup>13</sup> holding that Australian Safeway Stores Pty. Ltd., one of Australia's largest grocery retailers, had fixed the retail price of bread and misused its market power in a number of instances, in January 2006 the Federal Court penalized Safeway AU\$8.9 million (approximately US\$7 million).<sup>14</sup> The

10. Trade Practices Amendment (National Access Regime) Act, 2006 (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/num\\_act/tpaara2006922006429/](http://www.austlii.edu.au/au/legis/cth/num_act/tpaara2006922006429/) (last visited Mar. 19, 2007).

11. The Broadcasting Services Amendment (Media Ownership) Act, 2006 (Austl.), available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/asmade/bytitle/D521B53B624EF88DCA2572200010B119?OpenDocument> (last visited Nov. 29, 2006).

12. AUSTRALIAN COMPETITION & CONSUMER COMMISSION [ACCC], MERGER REVIEW PROCESS GUIDELINES (2006), available at <http://www.accc.gov.au/content/index.php?id/740765/fromItemId/3737> (last visited Nov. 29, 2006). The process guidelines replace the Guideline for Informal Merger Review, which was originally issued in October 2004.

13. Australian Competition & Consumer Comm'n v. Australian Safeway Stores Pty Ltd. (2003) FCAFC 149, available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/149.html> (last visited Nov. 29, 2006).

14. Australian Competition & Consumer Comm'n v. Australian Safeway Stores Pty Ltd. (No. 4) (2006) FCA 21, available at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2006/21.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/21.html) (last visited Nov. 29, 2006).

case involved allegations that Safeway refused to purchase further supplies of bread from a baker that was supplying retailers who were discounting the price of bread, and recommenced purchasing from the baker when the discounting stopped.

#### D. COURT DECISIONS

##### 1. *ACCC v. Baxter Healthcare Pty*<sup>15</sup>

Following an appeal to the full Federal Court by the ACCC, the Court handed down its decision on August 24, 2006, affirming the Federal Court's decision that Baxter Healthcare had misused its market power and engaged in exclusive dealing for the purposes of lessening competition in the market. However, there was no breach of the TPA because the doctrine of 'derivative crown immunity' applied because Baxter's sales were made to the government.

##### 2. *Sydney Airport Corp. v. Virgin Blue & Qantas*<sup>16</sup>

The first major appellate judgment on the operation of Australia's National Access Regime came down in October 2006. The Federal Court held that in assessing whether a service should be "declared," the question is simply whether access or increased access would promote competition. As a result, the Competition Tribunal's decision to declare the airside service at Sydney Airport was upheld, and therefore the terms and conditions of certain services provided at Sydney Airport are now able to be arbitrated after a failed agreement between the parties.

##### 3. *Campbells Cash and Carry Pty. v. Fostif Pty*<sup>17</sup>

In August 2006, the High Court handed down a decision allowing private lending companies to fund class action lawsuits. The majority held that the funding did not abuse the Court's process and was not contrary to public policy, despite the funding company having had authority to settle the suit and retain legal counsel. Although this case did not involve antitrust issues, the resulting increase in plaintiffs' available funding options may lead to more class action suits being initiated for violations of the TPA.

### III. Developments in Brazil

#### A. MERGER ACTIVITY

On May 24, 2006, the Administrative Council of Economic Defense (CADE) conditionally approved the merger of DirecTV and Sky, a subsidiary of News Corp., involving

15. Australian Competition & Consumer Comm'n v. Baxter Healthcare Pty Ltd. (2006) FCAFC 128, available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/128.html> (last visited Nov. 29, 2006).

16. Sydney Airport Corp. Ltd. v. Australian Competition Tribunal (2006) FCAFC 146, available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/146.html> (last visited Nov. 29, 2006).

17. Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd. (2006) HCA 41, available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/41.html> (last visited Nov. 29, 2006).

national and multinational media companies.<sup>18</sup> CADE's conditions related to (1) Pay-TV content, (2) media rights on sporting events, and (3) some consumer issues.

On August 7, 2006, the Secretariat of Economic Law (SDE) and the Secretariat for Economic Monitoring (SEAE) conditionally recommended CADE's approval in another case involving some of the biggest paper manufacturers in Brazil.<sup>19</sup> Votorantim and Suzano sought to acquire control of their competitor Ripasa. The conditions aimed to resolve SDE and SEAE's concerns about the possibility of coordination between Votorantim and Suzano, who are direct competitors.

Finally, in May 2006, CSN, a major steel producer, submitted for review its proposed acquisition of Prada, one of its key customers.<sup>20</sup> This transaction is currently being challenged by SIEMESP, a trade union.

## B. CARTEL ENFORCEMENT

In November 2005 CADE found Microsoft and TBA Informática guilty of exclusionary practices.<sup>21</sup> Microsoft appealed CADE's decision, and at the same time invited CADE to accept a reduction of its fine in exchange for withdrawing its judicial appeal. After receiving a positive opinion from CADE's Attorney General, CADE's Board accepted Microsoft's offer to pay approximately US\$2.2 million and closed the case.

Another important case in 2006 involved a longstanding investigation of a cartel in the orange juice industry in which orange juice producers were investigated for price fixing and market division.<sup>22</sup> The price fixing occurred in the purchase of oranges to make the juice. SDE obtained some documents through a dawn raid, but a judicial order held that the documents could not be viewed (not even by SDE) once the parties involved questioned the way they had been obtained. SDE recommended that CADE reach a settlement agreement, according to which the companies would not admit liability but still pay approximately US\$25 million. But after being challenged by the farmers that supply the industry with oranges, the recommendation was unanimously denied by CADE.<sup>23</sup>

18. See Conselho Administrativo de Defesa Econômica [CADE], Concentration Acts 53500.002423/2003 & 53500.029160/2004, available at <http://www.cade.gov.br/jurisprudencia/dprocesso.asp?pc=2407> (last visited Nov. 3, 2006).

19. See Secretaria de Acompanhamento Econômico [SDE], Ministério da Fazenda, Concentration Act No. 08012.010195/2004-19, available at <http://www.fazenda.gov.br/seae/littera/pdf/08012010195200419.pdf> (last visited Nov. 3, 2006).

20. See Conselho Administrativo de Defesa Econômica [CADE], Administrative Process No. 08012.004385/2006-51, available at [http://www.cade.gov.br/ASPIntranet/andamento.asp?pro\\_codigo=3237](http://www.cade.gov.br/ASPIntranet/andamento.asp?pro_codigo=3237) (last visited Nov. 20, 2006).

21. See Conselho Administrativo de Defesa Econômica [CADE], Administrative Process No. 08012.008024/1998-49, available at [http://www.cade.gov.br/ASPIntranet/andamento.asp?pro\\_codigo=928](http://www.cade.gov.br/ASPIntranet/andamento.asp?pro_codigo=928) (last visited Nov. 3, 2006).

22. See Conselho Administrativo de Defesa Econômica [CADE], Administrative Process No. 08012.008372/1999-14, available at [http://www.cade.gov.br/ASPIntranet/andamento.asp?pro\\_codigo=3364](http://www.cade.gov.br/ASPIntranet/andamento.asp?pro_codigo=3364) (last visited Nov. 3, 2006).

23. *Id.* (CADE unanimously denied its approval of the agreement suggested by SDE during the public hearing that took place on Nov. 23, 2006.).

### C. JUDICIAL DECISIONS

After years of judicial proceedings, a final decision has been issued by the Seventh Federal Circuit in the CADE/White Martins case,<sup>24</sup> upholding CADE's original decision that White Martins had engaged in exclusionary practices in the CO<sub>2</sub> market in 2002.<sup>25</sup> The fine imposed by CADE, of approximately US\$22 million, was also upheld.

In September 2005, the Superior Court of Justice granted a preliminary injunction in favor of AMCOR, a polyethylene terephthalate (PET) packaging producer, against an act of the Brazilian Government that would lead to market foreclosure. The Brazilian Government had tried to oblige PET producers to obtain a significant part of their raw materials (PET resins) from local producers. The preliminary injunction was based, *inter alia*, on competition arguments advocated by SDE and SEAE.

## IV. Developments in Canada

### A. MERGERS

On March 6, 2006, the Competition Bureau (Bureau) reported on its review of the acquisition of Sogides Ltée (Sogides), a publishing and distribution group, by Quebecor Media Inc. (QMI).<sup>26</sup> While the Bureau had no concerns regarding the state of competition in the publishing and distribution of French-language trade books, it did require a consent agreement to address the possibility of information exchanges between competitors. Sogides' president, Pierre Lespérance, was a Director of Gestion Renaud-Bray, a competitor of QMI's Archambault Group Inc. Pursuant to the consent agreement, Mr. Lespérance agreed to resign from his directorship, and an independent agent was appointed to represent Mr. Lespérance on the Board.

On August 22, 2006, the Bureau outlined its reasons for determining that the acquisition of Cascades Resources (Cascades) by PaperlinX Canada Ltd. (PaperlinX) would likely prevent or substantially lessen competition in the distribution of fine paper by full-line merchants.<sup>27</sup> A consent agreement was entered into requiring PaperlinX to divest of all of Cascades' assets relating to the fine paper merchant business in British Columbia and Alberta. The Bureau found that significant barriers to entry exist in the fine paper market and that there would only be two full-line merchants remaining in British Columbia and Alberta post-merger; i.e., the merged entity and Unisource Canada, Inc.

24. See J.F.-7, No. 2004.34.00.013282-7, 19.04.2004 (Brazil), available at <http://processual-df.trf1.gov.br/Processos/ProcessosSecaoOra/ConsProcSecaoopro.php?SECAO=DF&proc=200434000132827> (last visited Mar. 19, 2007).

25. See Conselho Administrativo de Defesa Econômica [CADE], Administrative Process No. 08000.022579/97-05, available at [http://www.cade.gov.br/ASPIntranet/andamento.asp?pro\\_codigo=2048](http://www.cade.gov.br/ASPIntranet/andamento.asp?pro_codigo=2048) (last visited Nov. 3, 2006).

26. Competition Bureau, *Acquisition of Sogides Ltée by Quebecor Media Inc.*, Mar. 2006, <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2032&lg=e> (last visited Nov. 28, 2006).

27. Competition Bureau, *Asset Acquisition by PaperlinX Canada Ltd. from Cascades Resources Fine Papers Group Inc.*, Aug. 2006, <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2157&lg=e> (last visited Nov. 28, 2006).

On October 31, 2006, the Bureau reported on its review of the acquisition of Arcelor SA by Mittal Steel Company NV.<sup>28</sup> The Bureau focused its review on the flat carbon steel market in North America. While high barriers to entry exist in the steel industry, the Bureau determined that, due to the significant countervailing power possessed by buyers in the automotive sector—the largest consumer in the relevant steel market—and the low risk that steel producers would engage in coordinated behavior, a sufficient level of competition would remain post-transaction.

On September 22, 2006, the Bureau released its final *Information Bulletin on Merger Remedies in Canada*.<sup>29</sup> The highlights of the bulletin include a preference for structural, as opposed to behavioral, remedies; a short divestiture period (three to six months) before which a divestiture by trustee will be required; the potential inclusion of “crown jewel” assets in the trustee sale; and a “no minimum price” requirement for trustee divestitures.

## B. CRIMINAL MATTERS

On January 9, 2006, the Bureau announced that Cascades Fine Papers Group Inc., Domtar Inc., and Unisource Canada, Inc. had each pled guilty to two counts of conspiring to lessen competition unduly in the supply of carbonless sheet paper.<sup>30</sup> Each company was sentenced to a fine of \$12.5 million Canadian (approximately US\$11 million), a record for domestic conspiracy convictions. In addition, key personnel involved in the conspiracy were ordered to be removed from their positions. This conspiracy conviction, as well as two ongoing matters (alleged price fixing among gas retailers in Quebec and alleged anti-competitive acts in the tour operators industry), underscore the Bureau’s increased focus on domestic cartels. The Bureau intends to release guidelines regarding its immunity program by March 2007.

## C. CIVIL MATTERS

On June 23, 2006, the Federal Court of Appeal allowed the Commissioner’s appeal and set aside the Competition Tribunal’s (Tribunal) decision in the abuse of dominance case against Canada Pipe Company (Canada Pipe).<sup>31</sup> The Court found that the Tribunal had applied the wrong test for assessing anticompetitive effects. It held that instead of evaluating the level of competition remaining in the market, the Tribunal should have applied a “but for” test to assess whether the impugned practice prevented or lessened competition. The Court also indicated that a valid business justification must have “a credible or pro-efficiency rationale . . . which relates to and counterbalances the anticompetitive effects and/or subjective intent of the acts.”<sup>32</sup> The matter was referred back to the Tribunal for

28. Competition Bureau, Proposed Acquisition of Arcelor by Mittal, Oct. 2006, <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2224&lg=e> (last visited Nov. 28, 2006).

29. Press Release, Competition Bureau, Competition Bureau Publishes Bulletin on Merger Remedies (Sept. 22, 2006), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2169&lg=e>.

30. Press Release, Competition Bureau, Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy (Jan. 9, 2006), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2018&lg=e>.

31. For a discussion of the Competition Tribunal’s decision, see Fiona A. Schaeffer et al., *International Antitrust*, 40 INT’L LAW. 159 (2006) [hereinafter 2005 Year in Review].

32. *Id.*

re-determination.<sup>33</sup> Canada Pipe is seeking leave to appeal to the Supreme Court of Canada.

On September 26, 2006, the Bureau issued, for public comment, a draft of its *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry*, which provides guidance on the application of the Competition Act in light of the deregulation of the telecom industry.<sup>34</sup> The Bulletin indicates that the Bureau's involvement in applying the Competition Act to telecom firms' behavior is limited to those areas in which the Canadian Radio-television and Telecommunications Commission has made a decision to refrain from regulating. The Bureau highlighted four key concerns in the telecom industry: raising rivals' costs and market foreclosure; predatory pricing; targeted pricing; and bundling.

## V. Developments in Chile

### A. LEGISLATIVE INITIATIVES

Although the last reform to the antitrust legislation was enacted only a few years ago,<sup>35</sup> the Executive recently sent a new initiative to Congress proposing further changes. This new bill proposes a series of modifications, including an increase in the amounts of the fines, greater investigative powers for the Antitrust Attorney General (the agency in charge of prosecuting antitrust infringements), and a new leniency rule for persons revealing anticompetitive agreements among competitors, all of which seek to strengthen the enforcement of the Antitrust Statute.<sup>36</sup>

### B. MERGERS

In merger enforcement, the Antitrust Attorney General issued guidelines that publicize the criteria employed by the prosecutor when analyzing the antitrust implications of horizontal concentrations such as mergers, acquisitions, strategic alliances, etc.<sup>37</sup> After months of gathering the opinions of several experts and of internal discussion, a final version of the guidelines was released in late October 2006. There were no significant rulings issued regarding merger enforcement in 2006.

### C. CARTELS, PREDATORY PRICING, ABUSE OF DOMINANT POSITION

Important decisions were rendered in 2006 in connection with cartel enforcement, predatory pricing, and abuse of dominant position. An important dissent regarding the

33. *Comm'r of Competition v. Canada Pipe Co.*, [2006] F.C. 223 (appeal), [2006] F.C. 236 (cross-appeal).

34. Press Release, Competition Bureau, Competition Bureau Seeks Public Comment on its Draft Bulletin on the Abuse of Dominance in Telecommunications (Sept. 26, 2006), available at <http://www.competitionbureau.gc.ca/Internet/index.cfm?itemID=2195&lg=e>.

35. The current text of the Chilean Competition Law is available at [http://www.fne.cl/13bajar/competition\\_law.zip](http://www.fne.cl/13bajar/competition_law.zip) (last visited Mar. 19, 2007).

36. Bill No. 4630/2006 (Chile), available at <http://www.bcn.cl> (last visited Mar. 19, 2007).

37. Fiscalía Nacional Económica [FNE], *Guía Interna Para el Análisis de Operaciones de Concentración Horizontales* (Oct. 2006), available at <http://www.fne.cl> (follow the "Guía de Concentración" link) (last visited Mar. 19, 2007).

burden of proof in cartel cases was issued in a case that condemned several medical oxygen companies on collusion charges, and a two-step test was established by the Antitrust Court in the analysis of predatory pricing cases.<sup>38</sup> Also, a very significant decision pertaining to the telecommunications market was rendered in October 2006, in which the Antitrust Court issued a judgment ruling in favor of the plaintiff and against Chile's dominant and most important local phone company.<sup>39</sup> This ruling, which solved the conflict between an Internet Service Provider offering IP Telephone Services and the aforementioned dominant local phone company, was controversial because the Antitrust Court's interpretation, which found that IP services are not of a public nature, basically allowed Internet Service Providers offering IP Telephone Services to offer such services without having to request a concession from the competent authorities.

## VI. Developments in China

### A. INTRODUCTION

Provisions addressing competition issues in China remain scattered among several laws and regulations. While temporary rules have been issued in recent years to provide interim regulation of selected issues, most are relatively unclear and ambiguous in defining the proscribed conduct. Enforcement has been very limited so far, but the still-forthcoming Anti-Monopoly Law is expected to bring broader coverage, clarity, and enforcement.

### B. LEGISLATIVE DEVELOPMENTS

In June 2006, after numerous revisions since 1994, the most recent version of the draft Anti-Monopoly Law was approved by the State Council and submitted to the National People's Congress (NPC) for approval.<sup>40</sup> While it is expected to become law in 2007, previous predictions of imminent passage have been wrong, and it is possible that the final law will reflect further substantive changes.

In broad view, the current draft conforms to common international competition law principles and practices, but there is much uncertainty and thus concern in some quarters about the details and likely implementation. Importantly, the new law seems equally to apply to both domestic and foreign companies, although it is unclear to what extent the

38. The cartel case decision was Judgment No. 43/2006, complaint filed by the Antitrust Attorney General against Air Liquide Chile S.A. and Others, *Sentencia No. 43/2006, Requerimiento del Fiscal Nacional Económico en contra de Air Liquide Chile S.A. y Otros* (rendered on Sept. 7, 2006) (appeal pending before the Supreme Court). The predatory pricing case was decided by Judgment No. 39/2006, suit filed by Quimel S.A. against James Hardie Fibrocementos Ltda., *Sentencia No. 39/2006, Demanda de Quimel S.A. contra James Hardie Fibrocementos Ltda.* (rendered on June 13, 2006) (appeal pending before the Supreme Court). Both decisions are available at <http://www.tdlc.cl>.

39. This case was decided by Judgment No. 45/2006, suit filed by Voissnet S.A. and complaint filed by the Antitrust Attorney General's Office against CTC, *Sentencia No. 45/2006, Demanda de Voissnet S.A. y Requerimiento de la FNE en contra de CTC* (rendered on Oct. 26, 2006) (appeal pending before the Supreme Court), available at <http://www.tdlc.cl>.

40. For the approval of the draft Anti-Monopoly Law by the State Council, see [http://news.xinhuanet.com/legal/2006-06/08/content\\_4661181.htm](http://news.xinhuanet.com/legal/2006-06/08/content_4661181.htm). For the first review (in Chinese) of the draft law by the National People's Congress see [http://news.xinhuanet.com/fortune/2006-06/28/content\\_4760486.htm](http://news.xinhuanet.com/fortune/2006-06/28/content_4760486.htm) (last visited Mar. 19, 2007).

new Anti-Monopoly Authority will pursue large Chinese state-owned enterprises for violations of their generally dominant market positions. Similarly, the most recent draft resurrects a prohibition on administrative (government) abuses of power with anticompetitive effects, but some observers have voiced skepticism about how this can be implemented in practice.

### C. CONDUCT ENFORCEMENT

Existing Chinese laws and regulations provide limited coverage of competition issues, including prohibitions on price-fixing, bid-rigging, tying, predatory pricing, and price discrimination, as well as regulations governing the pricing and other activities of dominant firms. But in many cases the proscribed conduct never has been defined in law, regulation, or practice, and the limited public reporting of enforcement actions in China makes it difficult to ascertain the extent of any enforcement.

### D. MERGER ENFORCEMENT

Given the apparent lack of enforcement to date, the greatest concern for most multinational companies is to comply with the existing Chinese merger control scheme. In the last nearly four years, more than 100 filings have been made by foreign investors (the scheme does not reach purely domestic transactions) under the scheme. While no transaction is known to have been enjoined or abandoned solely as a result of competitive concerns to this point, it appears that several recent mergers have been examined closely under a relatively new second-phase review and hearing process; but again, the lack of transparent public reporting makes tracking enforcement policy and procedural shifts somewhat difficult and unreliable.

## VII. Developments in the European Union

### A. MERGERS

#### 1. *National Champions*

A notable development in European mergers has been the European Member States' attempted protection or creation of "national champions," particularly in the energy and banking sectors:

- In spite of the Commission granting clearance, the Spanish regulator initially attempted to block the purchase of the Spanish energy supplier Endesa by German energy supplier, E.ON. Following sustained pressure from the Commission, it withdrew its objections;<sup>41</sup>

41. See Press Release, Europa, Mergers: Commission Rules Against Spanish Energy Regulator's Measures Concerning E.ON's Bid for Endesa (Sept. 26, 2006) (translated version), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=ip/06/1265&format=HTML&aged=0&language=EN&guiLanguage=en> [hereinafter Europa Press Release]. For an authentic version, see Reglamento (CE) n 139/2004, Sobre las Concentraciones, art. 21 (Sept. 26, 2006), available at [http://ec.europa.eu/comm/competition/mergers/cases/additional\\_data/m4197\\_es.pdf](http://ec.europa.eu/comm/competition/mergers/cases/additional_data/m4197_es.pdf); see also *Spain Limits Conditions on Endesa Deal*, THE TIMES (London), Nov. 6, 2006.

- The French government controversially backed the merger of Suez and Gaz de France to create a French national energy champion.<sup>42</sup> This merger was approved on November 14, 2006;<sup>43</sup>
- The Italian bank, Unicredit, purchased HVB bank, and as a result Unicredit controls two of the largest banks in Poland. The Polish government first attempted to impose divestiture and is now appealing the clearance decision in the EU Court of First Instance (CFI).<sup>44</sup>

## 2. *Innovative Analytical Approaches*

A relatively new aspect of the Commission's investigation of mergers is in the analysis of unilateral effects, which seeks to avoid an enforcement gap where the merged entity is not the clear market leader in terms of market share. This new approach was applied in the T-Mobile/Telering case<sup>45</sup> where Tele.ring was a maverick in the market.<sup>46</sup> An interesting corollary to the unilateral effects analysis is the Commission's new reliance on the concept of bidding markets, as for example, in the Abertis and Autostrade case.<sup>47</sup>

## 3. *Sony/BMG*

The Commission's clearance decision of the merger of Sony and BMG was challenged in the CFI. For the first time, the CFI annulled a Commission clearance decision.<sup>48</sup> The decision also represents a careful step back from the *Airtours* decision,<sup>49</sup> where the CFI laid down stringent conditions for blocking a merger on grounds of collective dominance. The CFI now appears to be allowing the Commission more room to maneuver in using collective dominance theories against oligopolies.<sup>50</sup> Also, as a consequence of the decision, Sony BMG has been obliged to re-notify the merger, which the Commission is now re-considering in light of the CFI's requirements.

42. See Peggy Hollinger et al, *Gaz de France and Suez Look at Tie-up to Fight Enel*, FINANCIAL TIMES (London), Feb. 24, 2006, at 1.

43. See Europa Press Release, *supra* note 41.

44. Case T-41/06, Republic of Poland v. Comm'n, 2006 E.C.R., available at [http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2006/c\\_096/c\\_09620060422en00170018.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2006/c_096/c_09620060422en00170018.pdf) (last visited Mar. 19, 2007).

45. Case Comp/M. 3916, T-Mobile Austria/Telering, 2006 E.C.R., available at [http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3916\\_20060426\\_20600\\_en.pdf](http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3916_20060426_20600_en.pdf) (last visited Mar. 19, 2007).

46. Philip Lowe, Director General, European Commission, DG Competition, EC Merger Regulation: Is There Really a New Approach?, Address at European Competition Day 2006 (June 19, 2006) (transcript available at [http://ec.europa.eu/comm/competition/misc/european\\_competition\\_day/lowe.pdf](http://ec.europa.eu/comm/competition/misc/european_competition_day/lowe.pdf)).

47. Case No. Comp/M.4249—Abertis Autostrade, 2006 E.C.R., available at [http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4249\\_20060922\\_20310\\_en.pdf](http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4249_20060922_20310_en.pdf) (last visited Mar. 19, 2007).

48. Case T-464/04, Impala v. Comm'n, 2006 E.C.R., available at <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en&Submit=submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-464%2F04&datef=&datefe=&nomusuel=&domaine=&mots=&resmax=100> (last visited Mar. 19, 2007).

49. Case IV/M.1524 - Airtours/First Choice, 1999 E.C.R., available at [http://ec.europa.eu/comm/competition/mergers/cases/decisions/m1524\\_19990922\\_610\\_en.pdf](http://ec.europa.eu/comm/competition/mergers/cases/decisions/m1524_19990922_610_en.pdf) (last visited Mar. 19, 2007).

50. Case T-464/04, Impala v. Comm'n, 2006 E.C.R., *supra* note 48.

## B. ABUSE OF DOMINANT POSITION

In March 2004, the Commission adopted a decision finding that Microsoft had abused its dominant position in the market for PC operating systems.<sup>51</sup> On March 10, 2006, the Commission announced that Microsoft still was not compliant with the decision,<sup>52</sup> and imposed penalty payments of 280.5 million euros. Microsoft has appealed.<sup>53</sup>

## C. ANTICOMPETITIVE PRACTICES

In May 2001, the Commission prohibited as anticompetitive, GlaxoSmithKline's (GSK) dual pricing system for pharmaceutical products in Spain. Under the system, GSK required its Spanish wholesalers to pay a higher price for products exported to other Member States than the price paid when reselling the same products on the domestic market.<sup>54</sup> GSK successfully appealed the Commission's decision to the CFI. In a decision issued on September 27, 2006, the CFI held that the dual pricing scheme did not have the object of restricting competition to the detriment of consumers. The Commission had not taken into account the specific characteristics of the pharmaceuticals market, where prices are not determined by supply and demand, but are set by state authorities. However, because the scheme could have a restrictive effect on competition, the Commission must consider whether it met the conditions for exemption under Article 81(3). Because the Commission had not considered the benefits of the scheme in terms of innovation and research and development, the Commission must therefore reconsider the notification for exemption.<sup>55</sup>

## D. CARTEL ENFORCEMENT

### 1. *Fines*

The Commission adopted four new cartel decisions in 2006,<sup>56</sup> all of which were discovered through the "confession" of an immunity applicant. The limit on the fines for any infringement is 10 percent of the worldwide turnover and, as the Commission seeks to

51. Case Comp/C-3/37.792 Microsoft, 2004 E.C.R., *available at* <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf> (last visited Mar. 19, 2007).

52. Press Release, Europa, Competition: Commission Sends Newsletter to Microsoft on Compliance with Decision (Oct. 3, 2006), *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=ip/06/298&format=HTML&aged=0&language=EN&guiLanguage=en>.

53. Press Release, Microsoft, Statement on July 12 Fine Announced by European Commission (July 12, 2006), *available at* <http://www.microsoft.com/presspass/press/2006/jul06/07-12EUFinPR.mspx>.

54. Press Release, Europa, Commission Prohibits Glaxo Wellcome's Dual Pricing System in Spain (May 8, 2001), *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=ip/01/661&format=HTML&aged=1&language=EN&guiLanguage=en>.

55. Press Release, Europa, The Court of First Instance Annuls in part the Decision Prohibiting Glaxo from Selling its Medicines at Different Prices According to the Place of Reimbursement (Sept. 27, 2006), *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=CJE/06/79&format=HTML&aged=0&language=EN&guiLanguage=en>. Judgment, Case T-168/01, Glaxo Smith Kline Servs. v. Comm'n, 2006 E.C.R., *available at* <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-168%2F01&datefs&datefe&nomusuel=&domaine=&mots=&resmax=100> (last visited Mar. 19, 2007).

56. In the fields of acrylic glass, copper fittings, Dutch road bitumen, and bleach chemicals, the Commission re-adopted a decision it had taken in relation to steel beams, after the CFI annulled the Commission's

pursue stronger enforcement of competition policy, fines in recent cases have come very close to that threshold.

## 2. *Leniency*

The Commission has also published a draft revised Leniency Notice which, among other things, seeks to codify the oral procedure for the submission of corporate statements and to introduce a marker system.<sup>57</sup> The draft notice does, however, retain a significant degree of discretion for the Commission.

## E. SECTOR INVESTIGATIONS

As previously reported,<sup>58</sup> in June 2005, the Commission announced sector investigations into competition in European energy markets and financial services markets. The Commission has published preliminary reports in relation to various aspects of both inquiries.<sup>59</sup> The reports highlight a number of barriers to liberalization in the markets and, subject to the outcome of public consultations,<sup>60</sup> the Commission will seek to impose corresponding remedies. Following from the sector investigation into mobile roaming charges<sup>61</sup> and calls for self-regulation,<sup>62</sup> the Commission tabled a roaming regulation<sup>63</sup> in July 2006 with the aim of bringing down the cost of roaming calls, particularly within the European Union.

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first decision on procedural grounds. See European Commission Cartel Cases, *available at* <http://ec.europa.eu/comm/competition/cartels/cases/cases.html> (last visited Mar. 19, 2007).

57. Draft Commission Notice, Immunity from Fines and Reduction of Fines in Cartel Cases, [http://ec.europa.eu/comm/competition/cartels/legislation/draft\\_revised\\_notice\\_en.pdf](http://ec.europa.eu/comm/competition/cartels/legislation/draft_revised_notice_en.pdf). For the press release and further details, see Europa, Leniency Notice, *available at* [http://ec.europa.eu/comm/competition/cartels/legislation/leniency\\_legislation.html](http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html) (last visited Mar. 19, 2007).

58. 2005 Year in Review, *supra* note 31.

59. In February 2006, the Commission published a preliminary report of its findings in the energy markets inquiry, which can be located at <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html> (last visited Mar. 19, 2007). In July 2006, the Commission published an interim report on the current accounts and related services markets, which can be located at [http://ec.europa.eu/comm/competition/antitrust/others/sector\\_inquiries/financial\\_services/public\\_consultation\\_2.html](http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/financial_services/public_consultation_2.html) (last visited Mar. 19, 2007).

60. The public consultations can be located at the following web addresses: <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/contributions.html> (last visited Mar. 19, 2007), and [http://ec.europa.eu/comm/competition/antitrust/others/sector\\_inquiries/financial\\_services/public\\_consultation\\_2.html](http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/financial_services/public_consultation_2.html) (last visited Mar. 19, 2007).

61. Europa, Competition, Sector Inquiries—Roaming, [http://ec.europa.eu/comm/competition/antitrust/others/sector\\_inquiries/roaming/index.html](http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/roaming/index.html) (last visited Mar. 19, 2007).

62. Press Release, Europa, Commissioner Reding Welcomes EU-wide Investigation on Cost of Using Mobile Phone Abroad (Dec. 9, 2004), *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=ip/04/1458&format=HTML&aged=1&language=EN&guiLanguage=en>; Press Release, Europa, Commission Warns Consumers on Cost of Using Mobile Phone Abroad and Targets Lack of Price Transparency (July 11, 2005), *available at* <http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=ip/05/901&format=HTML&aged=0&language=EN&guiLanguage=en>.

63. Commission of the European Communities, Proposal for a Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks (Dec. 7, 2006), *available at* [http://europa.eu.int/information\\_society/activities/roaming/docs/regulation/regulation\\_en.pdf](http://europa.eu.int/information_society/activities/roaming/docs/regulation/regulation_en.pdf).

## VIII. Developments in France

### A. MERGERS

#### 1. *CanalSat and TPS*

On August 30, 2006, the Ministry of the Economy (Ministry) authorized the merger of the two French satellite pay-TV platforms, CanalSat and TPS, after a Phase II investigation (requiring an advisory opinion by the French Competition Council before the Ministry could issue its decision) and the submission by the parties of fifty-nine commitments aimed at maintaining a sufficient degree of competition in the pay-TV market, as well as in upstream markets for the acquisition of movies and sports rights.<sup>64</sup> The Ministry took into account that pay-TV satellite platforms have already merged in other Member States of the EU and that several telecom operators have recently entered the pay-TV market. While the Ministry recognized that the new CanalSat/TPS entity would likely be the sole credible bidder for the acquisition of major broadcasting rights, the Ministry considered that the increased purchasing power of the new entity would be partially constrained by the strong position of some rights owners, such as American movie studios and the French football league.

#### 2. *Competence of the French Competition Council*

Under French competition law, the Ministry of the Economy is responsible for merger control procedures, and while it may request advisory opinions from the Competition Council, it is ultimately the Conseil d'État, the French supreme administrative court, that has the authority to review the Ministry's merger control decisions. However, in a decision rendered on October 20, 2006, the Competition Council declared itself competent to review a decision issued by the Ministry.<sup>65</sup> In this case, a company had been ordered by the Ministry to divest itself of certain of its warehouses, via a bidding process, in order to proceed with a subsequent merger. After the Ministry had approved the successful bidder, a third party brought a complaint before the Competition Council arguing that anticompetitive collusion had taken place. The Competition Council distinguished between, on the one hand, the appreciation and approval of the chosen acquirer, which remains the domain of the Ministry under Article 430-8 of the French Commercial Code and ultimately of the Conseil d'État, and on the other hand, the review of the actual bidding process which, if anticompetitive, would then fall under the competence of the Competition Council under Article 420-1 of the French Commercial Code.

64. Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes, *Lettre du ministre de l'économie, des finances et de l'industrie du 30 août 2006, aux conseils de la société Vivendi Universal, relative à une concentration dans le secteur de la télévision payante*, No. 7 (Sept. 15, 2006), available at [http://www.minefi.gouv.fr/dgccrf/boccrf/06\\_07bis/page3.pdf](http://www.minefi.gouv.fr/dgccrf/boccrf/06_07bis/page3.pdf).

65. Conseil de la Concurrence, Republic Française, Decision No. 06-D-31 (Oct. 20, 2006), available at <http://www.conseil-concurrence.fr/pdf/avis/06d31.pdf>.

## B. ENFORCEMENT

In 2005, the French Competition Council issued twenty-eight opinions and ninety-eight decisions, of which thirty-one were penalty decisions amounting to a total of 754.4 million euros (approximately US\$938.5 million) in fines.<sup>66</sup>

1. *Leniency Program*

On April 11, 2006, the Competition Council issued its procedural notice on the French leniency program, providing guidelines based on Section IV of Article L. 464-2 of the French Commercial Code.<sup>67</sup> While the leniency program was first introduced in 2002, the notice provided additional and practical guidance to enterprises, especially regarding the conditions to be fulfilled in order to benefit from the program. To be eligible for the leniency program, enterprises must provide the French competition authorities with information or evidence of a prohibited agreement on a market where they did not previously have any such evidence.

If the Competition Council already possesses certain information on the practices revealed, it may still grant total immunity from fines, subject to certain conditions. Should an enterprise not qualify for full immunity, it may still benefit from a reduction in fines if it provides the Competition Council with evidence of the alleged infringement which, in addition to the evidence already in the Competition Council's possession, significantly strengthens its ability to prove the alleged infringement.

On April 6, 2006, the Competition Council issued its first decision applying the leniency program in one of seventeen pending leniency requests.<sup>68</sup> In this case, the enterprise that revealed the cartel benefited from a total immunity from fines, which could have amounted to 1.25 million euros (approximately US\$1.56 million), approximately 2 percent of its annual turnover.

2. *Anticompetitive Agreements*

On March 16, 2006, the Competition Council found that, between 1997 and 2000, thirteen manufacturers of luxury perfume and cosmetics (including Chanel, Dior, Guerlain) entered into resale price maintenance agreements with the distributors in their commercial networks, and in particular the national chains Marionnaud, Nocibé, and Séphora.<sup>69</sup> The Competition Council, taking into account the duration of the practices (from 1997 to 2000) and the size of the market affected, imposed fines totaling 46.2 million euros (approximately US\$ 57.48 million) on both the perfume manufacturers and their retailers.

66. THE FRENCH COMPETITION COUNCIL 2005 ANNUAL REPORT SUMMARY 26, available at [http://www.conseil-concurrence.fr/doc/synthese05\\_uk.pdf](http://www.conseil-concurrence.fr/doc/synthese05_uk.pdf) (last visited Feb. 5, 2007).

67. C. COM. § IV, art. L. 464-2, May 15, 2001, available at <http://www.conseil-concurrence.fr/doc/leniency.pdf>.

68. Conseil de la Concurrence, Republic Francaise, Decision No. 06-D-09, Apr. 11, 2006, available at <http://www.conseil-concurrence.fr/pdf/avis/06d09.pdf>.

69. Conseil de la Concurrence, Republic Francaise, Decision No. 06-D-04, Mar. 13, 2006, available at <http://www.conseil-concurrence.fr/pdf/avis/06d04.pdf>.

## IX. Developments in Germany

### A. LEGISLATIVE REFORM AND ORGANIZATIONAL CHANGES

In August 2006, the Federal Cartel Organization (FCO) announced a reorganization, in which it reassigned the individual decision making boards along broader industry lines.<sup>70</sup>

### B. MERGER CONTROL

As of December 2006, the FCO had opened seventeen Phase II merger investigations in 2006,<sup>71</sup> which resulted in three prohibitions, the most significant being the proposed merger between Springer and ProSiebenSat.1.<sup>72</sup> According to the FCO, the merger would have strengthened an existing duopoly in the market for television advertising and would also have strengthened Springer's existing dominant market position in two newspaper-related markets.

### C. CARTELS

The FCO issued only two decisions that imposed (fairly moderate) fines on pharmaceutical wholesalers and furniture transporters for violating the prohibition against cartels.<sup>73</sup>

#### 1. *Revised Leniency Guidelines*

In March 2006, the FCO published its revised leniency guidelines.<sup>74</sup> The new guidelines introduce a "marker system" under which cartel members can reserve a leniency rank for up to eight weeks by providing certain information. The FCO also clarified the conditions for the granting of immunity or a reduction of fines. An applicant who is the first to come forward and enables the FCO to obtain a search warrant against the other cartel members will obtain immunity from fines.

After a search has been conducted, the first company that cooperates with the FCO and submits evidence to prove the offence, can also obtain immunity. Firms that led the cartel activity or coerced others to participate in the cartel cannot qualify for full immunity. However, they and the other cartel members who have lost the "race" for first place can

70. Press releases, guidelines, and all decisions of the Federal Cartel Office cited below, as well as an organizational chart, are available on the website of the FCO at <http://www.bundeskartellamt.de> (last visited Nov. 28, 2006).

71. A significant number of Phase II reviews recently related to hospital markets; see most recently Marienhaus GmbH/Krankenhaus Ottweiler, Kinderklinik Kohlhof, Phase II clearance decision of June 6, 2006.

72. Axel Springer/ProSiebenSat.1 Media, prohibition decision of 19 January 2006; see also FCO Press Releases dated January 11, 16, and 24, 2006. Springer is one of the major newspaper publishers in Germany, and ProSiebenSat.1 combines four private TV channels.

73. See press releases dated September 1, 2006 (pharmaceutical wholesalers) and April 19, 2006 (furniture transport).

74. The guidelines replace the initial leniency guidelines published in 2000. Bundes Kartellamt, Immunity from and Reduction of Fines in Cartel Cases, Notice No. 9/2006 (Mar. 7, 2006), available at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/06\\_Bonusregelung\\_e.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_Bonusregelung_e.pdf). See also Press Release, FCO (Mar. 15, 2006).

still have their fines reduced by up to 50 percent, provided they cooperate with the authority.

## 2. *New Fining Guidelines*

In September 2006, the FCO published its first fining guidelines.<sup>75</sup> The FCO limits its fining power to the revenues that the offender has achieved in the relevant products and/or services markets in Germany. The fine can be up to 30 percent of such revenues, depending on the severity of the infringement. The basic amount can be increased or decreased by taking into account factors such as (1) deterrence, (2) aggravating circumstances (e.g., intent, activity, retaliation, etc.), and (3) mitigating circumstances (e.g., compensation, forced participation, passivity, etc.).

## 3. *Private Enforcement*

In December 2006, the Regional Court in Düsseldorf will hear oral arguments in the first ever collective action for damages based on a cartel decision in Germany.<sup>76</sup>

# X. **Developments in Hong Kong**

## A. LEGISLATIVE DEVELOPMENTS

At present, only two industry sectors—the telecommunications and broadcasting industries—are covered by Hong Kong's sector-specific competition law.<sup>77</sup> But the push to introduce a comprehensive, cross-sector competition law for Hong Kong has gathered momentum during 2006. The Competition Policy Review Committee, which was appointed in June 2005 to review the effectiveness of Hong Kong's competition policy, published a report of its recommendations on July 4, 2006 (the CPRC Report).<sup>78</sup> The CPRC Report recommended that a new comprehensive competition law, covering all sectors of the economy, should be introduced into Hong Kong. It further recommended the setting up of a Competition Commission to enforce this new law. In response, on November 6, 2006, the Government issued a discussion document seeking the public's view on whether there is a need for a cross-sector competition law in Hong Kong, and if so, what types of

75. Bekanntmachung Nr. 38/2006, Über die Festsetzung von Geldbußen (§ 81 Abs. 4 Satz 2 GWB), Sept. 2006, <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Bussgeldleitlinien.pdf> (last visited Mar. 19, 2007); see also Press Release, FCO, Bundeskartellamt verabschiedet Bußgeldleitlinien (Sept. 26, 2006), available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Bussgeldleitlinien.pdf>.

76. Cartel Damage Claims, available at <http://www.cdcag.com/> (last visited Nov. 28, 2006).

77. There are fair competition provisions in the Telecommunications Ordinance regulating the telecommunications sector. Telecommunications Ordinance, (2004) Cap. 106, § 7P (H.K.). The Telecommunications Authority is responsible for enforcing these provisions in the telecommunications sector. For more information, see Executive Summary, Telecommunications Authority Guidelines, Mergers and Acquisitions in Hong Kong Telecommunications Markets, available at [http://www.ofta.gov.hk/en/report-paper-guide/guidance-notes/gn\\_20040503\\_summary.pdf](http://www.ofta.gov.hk/en/report-paper-guide/guidance-notes/gn_20040503_summary.pdf) (last visited Mar. 19, 2007).

78. Legislative Council Panel on Economic Services, Report of the Competition Policy Review Committee, LC Paper No. CB(1)1923/05-06(01) (July 4, 2006), available at <http://www.legco.gov.hk/yr05-06/english/panels/es/papers/es0719cb1-1923-1e.pdf>.

conduct such a law should prohibit and what institutions should enforce such a law.<sup>79</sup> The deadline for submission of views was February 5, 2007.

## B. MERGERS & ACQUISITIONS

Since December 1, 2005, the Telecommunications Authority (TA) has made three more decisions under the still relatively new mergers and acquisitions provisions of the Telecommunications Ordinance (the TO)<sup>80</sup> by which the TA may investigate and regulate any change in the shareholding or ownership of a licensee if it finds that such change has, or is likely to have, the effect of substantially lessening competition in any relevant telecommunications market.<sup>81</sup>

### 1. *The Acquisition Of Shares in China Resources Peoples Telephone by China Mobile*

On December 22, 2005, the TA consented to a proposal from China Mobile (Hong Kong) Limited (CMHK) to acquire China Resources Peoples Telephone Company Limited (Peoples).<sup>82</sup> The TA concluded that the transaction was unlikely to have the effect of substantially lessening competition in the Hong Kong market for the retail supply of mobile telephony services to local and inbound roaming users, because: (1) there was no competitive overlap between the parties to the merger; (2) there was no evidence that the transaction would have a significant constraining effect on competition; and (3) any advantage that Peoples might gain would increase competition between mobile operators in the local market.

### 2. *The Joint Ownership Of Hong Kong CSL and New World PCS Limited*

On March 22, 2006, the TA consented to a request from Hong Kong CSL (CSL) and New World PCS Limited (NWPCS) for consent to combine and integrate the mobile telephony network businesses of the two entities.<sup>83</sup> The TA concluded that the transaction was unlikely to have the effect of substantially lessening competition in the Hong Kong market for the retail supply of mobile voice and data services because: (1) although CSL and NWPCS were competitors, the TA did not consider them to be as vigorous or as effective competitors against each other as they appeared to be against other mobile network operators; (2) the TA was satisfied that the transaction, which would reduce the number of mobile network operators from six to five, would not appreciably increase the risk of coordinated conduct in the future; and (3) the TA had not identified any additional

79. Press Release, Government of Hong Kong, Government Launches Consultation on Competition Policy (Nov. 6, 2006), available at <http://www.info.gov.hk/gia/general/200611/06/P200611060141.htm>.

80. Telecommunications Ordinance, (2004) Cap. 106, § 7P (H.K.).

81. The TA has issued guidelines under the TO. See Telecommunications Authority Guidelines, Mergers and Acquisitions in Hong Kong Telecommunications Markets, available at [http://www.ofta.gov.hk/zh/report-paper-guide/guidance-notes/gn\\_20040503.pdf](http://www.ofta.gov.hk/zh/report-paper-guide/guidance-notes/gn_20040503.pdf) (last visited Mar. 19, 2007).

82. Office of the Telecommunications Authority, Decision Granting Consent Under the Telecommunications Ordinance to the Acquisition of Peoples by China Mobile, Dec. 22, 2006, CAB Ref. No. CDN0197, available at <http://www.ofta.gov.hk/en/report-paper-guide/report/rp20051223.pdf>.

83. Office of the Telecommunications Authority, Decision Granting Consent Under the Telecommunications Ordinance to Joint Ownership of CSL and NWPCS, Mar. 22, 2006, 2006, CAB Ref. No. CDN0200, <http://www.ofta.gov.hk/en/report-paper-guide/report/rp20060322.pdf>.

indicators or evidence that price rises and output reductions for mobile voice and data services in Hong Kong would be likely as a result of the transaction.

3. *Asia Netcom Hong Kong Limited and Its Potential Consolidation with C2C (Hong Kong) Limited (C2C)*

On August 23, 2006, Asia Netcom Hong Kong Limited (Asia Netcom) announced that China Netcom had completed the sale of its entire ownership of Asia Netcom to an investor group at a price of US\$402 million.<sup>84</sup> On September 8, 2006, after a preliminary competition assessment in accordance with Section 7P of the TO and the TA's Merger and Acquisition Guidelines, the TA decided not to undertake a full competition investigation into the transaction,<sup>85</sup> because: (1) given the existence of competing cable systems and low barriers to entry due to available external facilities capacity, it was unlikely that the aggregation of the cable capacity of AsiaNetcom and C2C would increase their market power; (2) as there were a total of twenty-five licensed operators providing overland and submarine cable facilities to and from Hong Kong, the loss of competition between Asia Netcom and C2C would be unlikely to have any material effect on competition in the overall market; (3) the transaction would be unlikely to increase the risk of collusion in the market; and (4) it would be unlikely that Asia Netcom or C2C would be able to sustain any price increases without significant competitive restraint from competitors and customers.

## XI. Developments in Ireland

### A. LEGISLATION

The Competition (Amendment) Act 2006 repealed a 1987 Ministerial Order prohibiting certain trading practices in the grocery sector.<sup>86</sup> The new legislation removed the controversial ban on below-cost selling of grocery goods.

### B. MERGERS

The most significant merger decision in 2006 was the prohibition by the Competition Authority of the notified *Kingspan/Xtratherm* acquisition by Kingspan Group plc of Lea-

84. See Press Release, Asia Netcom, China Netcom Completes Sale of Asia Netcom: Ownership of Asia Netcom Transfers to International Investor Group (Aug. 23, 2006), available at [http://www.asianetcom.com/inter/index.asp?name=about\\_newsroom\\_view&id=95](http://www.asianetcom.com/inter/index.asp?name=about_newsroom_view&id=95).

85. Office of the Telecommunications Authority, Report on the Competition Impact of the Change of Ownership of [Asia Netcom] and its Potential Consolidation with C2C, Sept. 8, 2006, CAB Ref. No. CDN0204, available at <http://www.ofa.gov.hk/en/report-paper-guide/report/rp20060908.pdf>.

86. Competition (Amendment) Act, 2006 (Act No. 4/2006)(Ir.), available at <http://www.entemp.ie/publications/commerce/2006/competitionamendmentact.pdf> (last visited Nov. 28, 2006). The Act, with the exception of § 5(2), entered into force on Mar. 20, 2006, in accordance with the Competition (Amendment) Act 2006 (Commencement) Order, 2006 (S.I. No. 127/2006) (Ir.), available at <http://www.entemp.ie/publications/sis/2006/si127.pdf>.

nort Group following a full Phase II investigation.<sup>87</sup> Both companies are involved in the production and sale of insulation materials in Ireland and the United Kingdom. The merger was prohibited primarily because it would have resulted in an unacceptably high level of concentration on the Irish market. This was only the second time the Authority has blocked a proposed merger since the relevant provisions of the Competition Act 2002 went into effect.<sup>88</sup>

The Competition Act provides for strict time periods within which the Authority must make determinations in Phase I merger investigations. In the *Topaz/Statoil* case, which involved a merger between two large fuel importers and resellers, the Authority failed to make its determination by the date required under the Competition Act due to an administrative error. Consequently, the parties became automatically entitled to put the merger into effect.<sup>89</sup>

### C. CRIMINAL CARTELS

The Director of Public Prosecutions secured fifteen criminal convictions in a case involving a price-fixing cartel in the home heating oil sector in the west of Ireland.<sup>90</sup> This was the first time a jury trial was held for a competition offense in Europe. Most of the defendants were ordered to pay fines, and one was sentenced to six months imprisonment, which was suspended for one year. An individual charged with aiding and abetting an alleged cartel of Ford Motor car dealers faces trial in January 2007, in a case currently before the Central Criminal Court.<sup>91</sup>

### D. CONDUCT CASES

The Authority initiated High Court proceedings against the Irish Medical Organization (IMO), the professional body representing doctors in Ireland.<sup>92</sup> It contended that during a fee dispute, the IMO coordinated the behavior of its general practitioner (GP) members by, *inter alia*, directing or recommending the fees that GPs should charge for providing medical information to life insurance companies.

87. Ireland Competition Authority, Determination No. M/06/039 Kingspan/Xtratherm, available at [http://www.tca.ie/MergersAcquisitions/MergerNotifications/MergerNotifications.aspx?selected\\_item=265](http://www.tca.ie/MergersAcquisitions/MergerNotifications/MergerNotifications.aspx?selected_item=265) (last visited Nov. 28, 2006).

88. Competition Act, 2002 (Commencement) Order 2002 (S.I. No. 199/2002) (Ir.), pt. 3 (Mergers and Acquisitions), available at <http://www.irishstatutebook.ie> (last visited Nov. 28, 2006).

89. See Press Release, The Competition Authority, Agreement Between the Competition Authority and Topaz (Oct. 13, 2006), available at [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=176](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=176). See Press Release, The Competition Authority, Statement Regarding the Acquisition of Statoil by Topaz (Oct. 10, 2006), available at [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=175](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=175).

90. See Press Release, The Competition Authority, Opening Statement by the Chairperson of the Competition Authority, Mr. Bill Prasifka, to the Joint Oireachtas Committee on Enterprise and Small Business (Oct. 25, 2006), available at [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=177](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=177).

91. *Id.*

92. See Press Release, The Competition Authority, The Competition Authority Begins High Court Proceedings Against the Irish Medical Organization (July 3, 2006), available at [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=10](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=10).

In another case, the High Court refused to grant a declaration sought by the Authority that a proposed rationalization scheme by Irish beef processors was contrary to Irish and EU competition law. The Court held that the Authority failed to establish that the proposed scheme had the object or effect of restricting competition in the relevant markets.<sup>93</sup> The Authority's appeal to the Supreme Court in this case is likely to be heard in 2007.

The Authority closed its two-year investigation without taking action against alleged abuses of dominance by TicketMaster in connection with pricing practices in the Irish market for outsourced ticketing services for events of national or international appeal.<sup>94</sup> Although the Authority found that TicketMaster accounted for 100 percent of the relevant market, it made no finding of dominance, but concluded that the practices at issue involved no abuse of a dominant position. This was due to the countervailing buyer power of event organizers (who are TicketMaster's customers).

The Authority reached a settlement with two distributors in its investigation into the distribution of JCB agricultural and industrial equipment in Ireland in June 2006, closing its investigation into a retail sales joint venture agreement concluded between the parties without court proceedings or any admission of liability.<sup>95</sup> The Authority also concluded its investigation into alleged infringements of competition law by Timas Limited, trading as Galileo Ireland (Galileo), which operates the computerized reservation system used by most travel agents in Ireland.<sup>96</sup> The Authority received commitments from Galileo to deal with future requests from third parties for access to its computerized reservation system in an open, transparent, proportionate, and nondiscriminatory manner.

## XII. Developments in Israel

### A. NEW ANTITRUST GUIDELINES

In February 2006, the Antitrust Commissioner published guidelines concerning debt holding arrangements between competitors and the circumstances under which they constitute a prohibited Restrictive Arrangement.<sup>97</sup> The guidelines provide the criteria for reviewing such arrangements, including the degree of influence that the creditor has on the debtor's business (in accordance with the kind of debt holding arrangements and the creditor's rights under the loan), the financial strength of the debtor, the amount of the debt and its proportion in relation to the scope of the business, any additional arrange-

93. Competition Auth. v. Beef Indus. Dev. Society Ltd., [2006] (Unreported, H. Ct., McKechnie J.).

94. See Press Release, The Competition Authority, The Competition Authority Announces Closure of its Investigation of TicketMaster Ireland (Mar. 16, 2006), *available at* [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=16](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=16).

95. See Press Release, The Competition Authority, The Competition Authority Accepts Commitments from Irish Distributors of JCB Agricultural and Industrial Equipment (June 14, 2006), *available at* [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=2](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=2).

96. See Press Release, The Competition Authority, Investigation by the Competition Authority Leads to Greater Access to Travel Reservation System (Jan. 11, 2006), *available at* [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=20](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=20).

97. Israel Antitrust Authority, Guidelines 1/06—debt holding relationship between competitors as a restrictive arrangement, *available at* <http://www.antitrust.gov.il> (publication no. 5000202) (last visited Nov. 30, 2006).

ments existing between the parties, and the circumstances of the transaction along with its background.

## B. CIVIL ENFORCEMENT

In August 2006, the Antitrust Court issued its decision concerning the Multilateral Interchange Fee (MIF) in the Israeli Visa credit card system.<sup>98</sup> MIF and the appropriate methodology for setting merchant fees have been the subject of extensive briefing and hearings in the last four years. The Antitrust Court held that, to avoid antitrust liability, the MIF rate must be based solely on costs reflecting the risk of the transactions, instead of all issuing and clearing expenses as the Visa companies argued. The Court's decision is in line with the international trend requiring that MIF be based on the costs of transaction authorization, ensuring payment and debt financing. Following the Court's judgment, the Commissioner and the credit card companies entered an agreement wherein, for the first time, the MasterCard system will be opened for clearing by other acquirers<sup>99</sup> not related to Bank Ha'Poalim (the single MasterCard issuer in Israel). In addition, the agreement reduces the MIF from 1.25 percent to 0.875 percent.

## C. MERGERS

### 1. *Dor-Alon/Sonol*

In June 2006, the Supreme Court reversed the Antitrust Court's decision to approve, subject to conditions, a merger between Dor-Alon and Sonol, two of the four largest competitors in the highly concentrated domestic fuel market.<sup>100</sup> The Supreme Court thus agreed with the Commissioner's initial decision to oppose the merger.<sup>101</sup> The Supreme Court has not yet published the reasoning for its decision. Interestingly, the Antitrust Court decided to approve the merger despite its findings that the merger: (1) would eliminate Dor-Alon as a maverick competitor; (2) would result in a significant increase in concentration; and (3) given the major entry barriers to this industry, would probably harm competition in the fuel market. The Antitrust Court's reasoning for the approval relied on anticipated developments in the energy industry; i.e., an expected divestiture and privatization of the state-owned oil refineries. The Antitrust Court considered the possibility that a future purchaser of the refineries would become a competitor in the fuel marketing segment and concluded that the merger was a legitimate means to strengthen competitors that do not own a refinery and thus enhance competition.

98. ATF [Anti Trust Filing] (Jer.) 4630/01 Bank Leumi v. the Antitrust Comm'r, [2006] (not yet published).

99. The Visa system already has more than one acquirer. The Israel Antitrust Authority aims to reach a total set of agreements concerning credit card cross clearing which will encompass all companies in the credit card industry.

100. CA 3398/06 Antitrust Auth. v. Dor Alon Energy Isr. (1998) Ltd., TE 2006(2) 3848.

101. Israel Antitrust Authority, Reasons for the Antitrust Commissioner's Objection to the Merger between Dor Alon Energy Israel (1998) Ltd. and Sonol Israel Ltd. (Nov. 02, 2005) (publication no. 5000139), available at <http://www.antitrust.gov.il>.

## 2. *Paz Oil Company/Oil Refinery—Ashdod*

In September 2006, the Commissioner approved, subject to conditions, the merger of Paz Oil Company, Israel's largest oil company, and Ashdod Oil Refinery.<sup>102</sup> Paz acquired Ashdod from the State of Israel in a tender offering, following a government decision to split and privatize the state-owned oil refiners. The merger approval followed a pre-bid opinion of the Commissioner, stating that oil companies could acquire Ashdod, considering Ashdod's relatively small size and the advantages of vertical integration, which will benefit consumers. The Commissioner's approval conditions aim to ensure that Ashdod remains competitive, and they focus on Paz's market power in gas stations and liquid petroleum gas distribution.

## XIII. Developments in Italy

### A. LEGISLATIVE REFORM

In late December 2005, Law No. 262/2005, the Credit Reorganization Act,<sup>103</sup> transferred antitrust powers from the Bank of Italy to the Italian Competition Authority (ICA). In July 2006, Decree-Law No. 223/2006 (the Bersani Decree) introduced important changes to Law No. 287/90 (the Competition Act).<sup>104</sup> In accordance with EU Regulation No. 1/2003 (Modernization Regulation),<sup>105</sup> it sets out provisions empowering the ICA to impose interim measures, implement leniency programs, and adopt decisions based on remedies proposed by parties under investigation, that remove the concerns of the ICA.

### B. CARTELS

In April 2006, the ICA levied fines on the main industrial gas producers in Italy, after they were found to have engaged in anticompetitive market partitioning.<sup>106</sup> The ICA determined that the cartel lasted thirteen years (from 1991 until 2004) and involved the major market players (including Air Liquide and Linde). The ICA imposed total fines of approximately 57 million euros (approximately US\$75 million).

In June 2006, the ICA closed an investigation into a number of oil companies in relation to their anticompetitive arrangement to supply major Italian airports with jet fuel.<sup>107</sup> The ICA found that the purpose and effect of the arrangement was to partition the market and foreclose entry by new operators, including airlines intending to provide their own supplies. The ICA fined ENI, Esso, Kuwait, Shell, Tamoil, and Total approximately 315.4 million euros (approximately US\$415 million) in total.

102. Israel Antitrust Authority, Commissioner's Decision in the matter of Paz Oil Company Ltd with Oil Refinery - Ashdod Ltd, (publication no. 5000447), available at <http://www.antitrust.gov.il> (last visited Mar. 19, 2007).

103. Law No. 262/2005 of Dec. 28, 2005, Disposizioni per la tutela del risparmio e la disciplina dei mercati finanziari, Gazz. Uff. No. 301 (Dec. 28, 2005).

104. Law No. 287/90 of Oct. 10, 1990, Norme per la tutela della concorrenza e del mercato, Competition and Fair Trading Act (*Competition Act*), Gazz. Uff. No.240 (Oct. 13, 1990).

105. Council Regulation (EC) No. 1/2003 of Dec. 16, 2002 on the implementation of the rules on competition (*Modernization Regulation*), 2003 OJL (L1)1.

106. ICA Decision No. 15392, in case 1603, *Gas Technici (Technical Gases)*, published in Bulletin No. 17/2006.

107. ICA Decision No. 15604, in case 1641, *Jet Fuel*, published in Bulletin No. 23/2006.

### C. ABUSE OF DOMINANCE

In February 2006, the ICA imposed fines of 290 million euros (approximately US\$382 million) on ENI, the Italian incumbent gas operator, for having abused its dominant market position by hindering the entry of independent operators into the national market for the wholesale supply of natural gas.<sup>108</sup>

### D. MERGER CONTROL

In July 2006, the ICA determined that the merger of Alitalia and Volare could not be authorized as originally proposed.<sup>109</sup> It authorized the purchase of Volare on the condition that Alitalia give up two pairs of domestic slots from Linate on the Linate-Bari and Linate-Lamezia Terme routes that are flown by Volare. The ICA took into consideration the characteristics of the Milan airport, where congestion and regulation impede the entry of new operators and heavily condition the activities of those already present, and where Volare now has twelve pairs of slots.

Following a referral from the European Commission, in September 2006, the ICA launched an investigation into Assicurazioni Generali's acquisition of sole control over Toro Assicurazioni.<sup>110</sup> According to the ICA, the transaction, which will create the largest non-life insurance operator in Italy, could significantly reduce competition in various general insurance segments, particularly in light of the significant overlapping market shares of the companies. The ICA is bound to adopt a final decision in this case by December 1, 2006.

## XIV. Developments in Japan

### A. CARTEL/CRIMINAL ENFORCEMENT

January 2006 marked the effective date of Japan's new immunity and leniency program, which was enacted as part of the significant 2005 amendments to Japan's Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (the Antimonopoly Law or AML).<sup>111</sup> The first reported application occurred early this year, with three major Japanese industrial companies—Mitsubishi Heavy Industries; Ishikawajima Harima Heavy Industries, Co., Ltd.; and Kawasaki Heavy Industries Ltd.—ultimately receiving 100 percent, 30 percent, and 30 percent reductions in fines, respectively, in connection with an investigation into bid-rigging concerning tunnel ventilation construction.<sup>112</sup> The Japan Fair Trade Commission (JFTC) has touted the success of the leniency program, stating that, as of September 2006, some fifty to sixty companies have applied for leniency under

108. ICA Bulletin No. 5/2006, Decision No. 15174, in case A358, *Eni-Trans Tunisian Pipeline*.

109. ICA Bulletin No. 26/2006, Decision No. 15666, in case C7667, *Alitalia/ Volare*.

110. ICA Bulletin No. 35-36/2006, Decision No. 15911, in case C7951, *Assicurazioni Generali/Toro Assicurazioni*.

111. See Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, amended by Act No. 35 of 2005.

112. Decision of the Fair Trade Commission, Sept. 8, 2006, available at <http://www.jftc.go.jp/genmen/kouhyou.html>.

the new program.<sup>113</sup> This has quieted criticism that Japan's leniency program would not work effectively, due to the cultural desire among Japanese companies to maintain harmony.

The JFTC also used its newly authorized criminal powers under the amended AML during 2006. In May and June 2006, the newly established Criminal Investigation Department (*bansoku shinsa-bu*) of the JFTC filed its first criminal accusations against eleven companies and eleven individuals alleged to have engaged in prearranged biddings for certain waste disposal facility construction projects.<sup>114</sup>

## B. AMENDED HEARING PROCEDURES

The JFTC has claimed that its new hearing procedures, which became effective in January 2006, have been successful in reducing the period of time from when an investigation begins to when an order is issued by approximately 50 percent, to an average of between eight and nine months.<sup>115</sup> Under the new system, the JFTC gives the accused enterprise prior notice and an opportunity to rebut charges of illegal conduct (although not in an administrative hearing at this stage) before issuing simultaneous remedial and fining orders. This is unlike the prior recommendation system in which the JFTC issued a cease and desist recommendation to an accused violator without any formal prior notice. However, there is still strong opposition to the new system, particularly from the legal and business sectors.<sup>116</sup> Opponents claim that the new system fails to provide due process because the system of prior notice and opportunity to rebut the charges is overly simplistic, and the examiners, who are members of the JFTC, lack neutrality.

## C. MERGER ENFORCEMENT

While in 2005 the JFTC withheld approval for two major transactions,<sup>117</sup> generating speculation of an emerging trend of tighter merger control for Japan, this trend did not continue in 2006. In a recent case demonstrating a less rigid stance, the JFTC provided informal approval for a merger involving a combined Japanese market share of 45 percent for certain products in the Sankyo/Daiichi Pharmaceutical case, citing potential pressure from overseas companies as well as the bargaining power of purchasers.<sup>118</sup>

With respect to market share analysis, there is evidence that the JFTC is gradually accepting the policy of considering the worldwide market, rather than focusing on the Japanese market, in relevant situations. Thus, the JFTC permitted the merger of Sony's

113. Press Release, Japan, Fair Trade Commission, Processing Status of the Antimonopoly Act Enforcement in FY2005 (May 31, 2006), available at <http://www.jftc.go.jp/teirei/kaikenkiroku060913.html>.

114. Press Release, Japan, Fair Trade Commission, The JFTC Filed Additional Criminal Accusations Against [Eleven] Individuals Concerning the Bid-Riggings in the Human Waste Disposal Facilities Construction (June 12, 2006), available at <http://www.jftc.go.jp/e-page/pressreleases/2006/June/060612.pdf>.

115. See Fair Trade Commission, Japan, Hearing Systems and Procedures of the Fair Trade Commission (describing the amended hearing procedures by the JFTC), available at <http://www.jftc.go.jp/kaisei/kaisei03.html> and <http://www.jftc.go.jp/teirei/kaikenkiroku060913.html> (last visited Mar. 21, 2007).

116. Much of the opposition has come from Nippon Kei Danren (The Japan Business Federation).

117. In particular, the JFTC withheld informal approval from both the Tokai Carbon/Mitsubishi Chemical case and the Dai-Nippon Ink Chemicals/PS Japan case in their respective bids for business integrations.

118. Fair Trade Commission, Japan, Report on Major M&A Cases for the Fiscal Year 2005, Case No. 4, June 7, 2006.

and NEC's optical-disk drive businesses in a joint venture, clearly emphasizing the combined global market share (approximately 35 percent for DVD±RW drive) rather than the presumably more sizeable combined Japanese market share.<sup>119</sup>

## XV. Developments in Mexico

### A. LEGISLATIVE REFORM

New amendments to the Federal Law on Economic Competition (FLEC) came into effect on June 29, 2006.<sup>120</sup> These amendments were initially crafted by the Federal Competition Commission (FCC) and include significant changes in the area of merger review, the FCC's administrative procedures, the introduction of a leniency policy, and the treatment of monopolistic practices. Mostly, the amendments consolidate in the statute existing provisions included in the FLEC's implementing regulations, but they also include new features, primarily with respect to merger review, fines and remedies.

In particular, the amendments grant the FCC the power to issue a ten-day standstill order while a merger is awaiting a ruling in a compulsory pre-merger notification, meaning that the parties cannot consummate the merger before the FCC rules on the case. In addition, the monetary thresholds for mandatory notifications of mergers have been considerably raised (from approximately US\$53 million to approximately US\$80 million). The amendments also clarify that mergers involving only foreign companies with no assets in Mexico (foreign-to-foreign mergers) are exempted from notification.

The amendments significantly raise the fines for antitrust violations. The FLEC continues to provide for a maximum fine of up to 10 percent of the assets or yearly turnover of the offender. A leniency mechanism has been set up, allowing for a reduction in fines for the first whistleblower, as well as for later applicants who provide useful evidence. The amendments provide for the divestiture of assets as a potential penalty for offenders who are found liable for breaching the FLEC more than twice in the same relevant market.

The amendments introduce into the FLEC the concepts of predatory pricing, discounts or incentives tied to exclusive dealing, cross-subsidies, price discrimination, and raising rival's costs, and deem them to be "relative monopolistic practices" (rule of reason offenses).

In addition, efficiency defenses have been consolidated into the FLEC for rule of reason offenses. The amendments also provide for a new test of "no harm to competition" (no significant price increases, no significant reduction in consumer choice, no important inhibition in innovation), which a defendant needs to prove to offset alleged anticompetitive effects. Finally, the amendments include a provision whereby parties deciding upon a concerted action and those who actually engage in the actual prohibited practice share responsibility.

119. Fair Trade Commission, Japan, Report on Major M&A Cases for the Fiscal Year 2005, Case No. 8, June 7, 2006.

120. See Ley Federal de Competencia Economica [L.F.C.E.] [Competition Law] *as amended*, Diario Oficial de la Federación [D.O.], June 28, 2006 (Mex.).

## B. MERGER ENFORCEMENT

Based on press releases posted in the FCC website,<sup>121</sup> the FCC has reviewed about 150 pre-merger notifications through November, 2006. Of these, the FCC imposed conditions in one transaction (Televisa/ Televisión Internacional (TVI))<sup>122</sup> and blocked one transaction (Ferromex/Ferrosur).<sup>123</sup> In Televisa/TVI, although the FCC cleared the acquisition of TVI (a cable television company) by Televisa (the dominant broadcasting network), the conditions it imposed effectively blocked the deal. The FCC defined the relevant market as being the pay television and audio market in the Monterrey area. The FCC considered that, practically, the only competitors in this market were Sky, Televisa's subsidiary, and TVI. Thus, among the FCC conditions, Televisa had to divest its interests in Sky in the Monterrey area, a step it would not take. The parties are likely to request a judicial review of the FCC's decision.

In Ferromex/Ferrosur,<sup>124</sup> the FCC blocked the proposed merger between Ferromex, the operator of the North Pacific Railroad System, and Ferrosur, which operates the Southern Railroad System. The FCC considered, among other factors, that the transaction would be regressive to competition in the industry, returning to an environment similar to the pre-privatization era. Further, the transaction would limit the access of Kansas City Southern Mexico (KCSM), a competing railroad company, to several cities in the Gulf of Mexico and the Pacific coast, as well as near the United States border. Thus, the FCC concluded that the merger would harm customers and the competitive process. Ferromex and Ferrosur previously tried to merge in 2002, but the transaction was also blocked. The parties may resort to judicial review.

## XVI. Developments in New Zealand

## A. MERGER ACTIVITY

Continuing the trend of the previous two years, the Commerce Commission did not receive any applications for authorization of mergers, although, it did receive twenty-one applications for voluntary clearance. Of the twenty-one applications, sixteen were cleared, two were withdrawn and three decisions were pending as of the end of November 2006.<sup>125</sup> No clearance applications were declined during this period.

121. See Federal Competition Commission, *available at* <http://www.cfc.gob.mx> (last visited on Oct. 30, 2006).

122. *See id.*

123. Press Release, Mexico, Federal Competition Commission, Niega CFC por segunda ocasión la fusión Ferromex-Ferrosur (Nov. 15, 2006), *available at* [http://www.cfc.gob.mx/index.php?option=com\\_content&task=view&id=2778&Itemid=204](http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=2778&Itemid=204).

124. *Id.*

125. This data reflects merger clearance activity during the period from October 31, 2005, to November 28, 2006. For full register of clearance applications received by the Commerce Commission, *see* Commerce Commission, Public Registers, <http://www.comcom.govt.nz/PublicRegisters/mergersacquisitions-clearances.aspx>.

In *Commerce Commission v. New Zealand Bus Ltd.*,<sup>126</sup> the Court elaborated on the effect of a finding of association between an acquirer and the target when assessing the competitive effects of a merger. The Court rejected the submission by New Zealand Bus Limited (NZ Bus) that as a matter of law an acquisition between associated persons (which Section 47(3) of the Commerce Act defines as a relationship where one party "is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other")<sup>127</sup> is an internal transfer with no effect on competition. The Court also rejected the argument that a pre-existing association between two parties removes the need to assess the competitive effects of a further acquisition.

In one other development, this year the Commission and the Australian Competition and Consumer Commission agreed upon a Cooperation Protocol for Merger Review,<sup>128</sup> which is designed to enhance cooperation between them when carrying out merger reviews.

## B. AUTHORIZATIONS OF ANTICOMPETITIVE CONDUCT

In November 2005, the Commission received (and granted)<sup>129</sup> its first application since 2003 for authorization of an anticompetitive practice. The New Zealand Rugby Football Union applied for authorization to enter into and give effect to a salary cap arrangement and player movement regulations. In June 2006, the Commission also took the novel step of revoking an authorization that had previously been granted to three joint venture owners and operators of the Pohokura gas field allowing them engage in a restrictive trade practice.<sup>130</sup>

## C. ENFORCEMENT ACTIVITY

The Commission's focus on cartel behavior continued throughout 2006, as highlighted by the decision in *Koppers Arch Wood Protection (NZ) Limited*.<sup>131</sup> Following the commencement of an investigation last year, this decision represented the successful completion of proceedings against various parties for cartel conduct in the wood preservative chemicals industry as well as the imposition, via an agreed settlement, of the largest penalties for cartel behavior under the Commerce Act to date. The *NZ Bus* decision (discussed above)

126. *Commerce Comm'n v. NZ Bus Ltd.*, [2006] (High Court, Wellington, CIV 2006-485-585, Miller J), available at <http://jdo.justice.govt.nz/jdo/GetJudgment/?judgmentID=111434> <http://jdo.justice.govt.nz/jdo/GetJudgment/?judgmentID=111434>.

127. Commerce Act 1986, 1986 S.N.Z. No. 5 (NZ).

128. Commerce Commission, New Zealand, Cooperation Protocol for Merger Review, available at [http://www.comcom.govt.nz/TheCommission/InternationalAgreements/ContentFiles/Documents/494050\\_1.pdf](http://www.comcom.govt.nz/TheCommission/InternationalAgreements/ContentFiles/Documents/494050_1.pdf) (last visited Nov. 28 2006).

129. Commerce Commission, New Zealand, Decision 580: New Zealand Rugby Football Union Incorporated, June 2, 2006, available at <http://www.comcom.govt.nz/PublicRegisters/ContentFiles/Documents/FinalDetermination.pdf>.

130. Commerce Commission, New Zealand, Decision 581: OMV New Zealand Limited, Shell Exploration New Zealand Limited, Shell (Petroleum Mining) Company Limited, and Todd (Petroleum Mining Company) Limited, June 2, 2006, available at <http://www.comcom.govt.nz/PublicRegisters/ContentFiles/Documents/Pohokura Final Determination>, 02 June 2006.pdf.

131. *Commerce Commission v. Koppers Arch Wood Protection (NZ) Ltd.* [2006] (High Court, Auckland, CIV 2005-404-2080, Apr. 6, 2006, Williams J).

also marks the first time that the Commission has brought proceedings for a breach of the merger control provisions and sought penalties for such a breach.

In May 2006, the Commission conducted its first investigation under the merger control provisions for noncompliance with a divestment undertaking.<sup>132</sup> Although the investigation did not result in any further action being taken, it demonstrates that the Commission is actively monitoring compliance and considers that any noncompliance removes the benefit of the clearance in respect of the entire acquisition.

Finally, in August 2006, the Cease and Desist Commissioner issued a Cease and Desist Order against Northport Limited after concluding that Northport, owner of the only port in Whangarei (Port), had breached the Commerce Act by: (1) taking advantage of its substantial power in the market for the provision of access to the Port for the substantial purpose of restricting a competitor of Northport Services Limited (NSL) from competing with NSL in the market for the provision of general cargo marshalling services to shippers using the Port, and in the market for the provision of stevedoring services to shippers using the Port; (2) granting an exclusive license for the provision of marshalling services to NSL; and (3) refusing to grant a competitor access to the Port to deliver cargo for export shipment except under certain conditions, all of which had the purpose and/or the likely effect of substantially lessening competition in those markets.<sup>133</sup>

## XVII. Developments in Russia

On July 26, 2006, President Vladimir Putin signed into law Federal Law No. 135-FZ On Protection of Competition (the New Competition Law). The New Competition Law supersedes the Law of RSFSR No. 948-I On Competition and Limitation of Monopolistic Activity on the Commodities Markets, dated March 22, 1991, and Federal Law No. 117-FZ On Protection of Competition on the Financial Services Market, dated June 23, 1999, which applied to banks. The New Competition Law became effective on October 26, 2006. Any application filed with the Russian antimonopoly authorities (FAS) after that date is to be considered under the new regime.

The New Competition Law has introduced changes to merger control, antitrust provisions, state aid and public procurement matters. It also regulates anticompetitive behavior and unfair competition by financial institutions, which were previously regulated by a separate law. The following is a brief overview of the major revisions.

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132. Press Release, Commerce Commission, New Zealand, Commission Investigating Pernod Ricard's Acquisition of Allied Domecq (May 1, 2006), *available at* <http://www.comcom.govt.nz/MediaCentre/MediaReleases/200506/commissioninvestigatingpernodricar.aspx>; *see also* Press Release, Commerce Commission, New Zealand, Commission Closes Investigation in to Pernod Ricard's Acquisition of Allied Domecq (June 30, 2006), *available at* <http://www.comcom.govt.nz/MediaCentre/MediaReleases/200506/commissionclosesinvestigationintop.aspx>.

133. Neither the decision nor the order were publicly available at the time of publication. Press Release, Commerce Commission, New Zealand, First Ever Cease and Desist Order Issued against Northport (Aug. 14, 2006), *available at* <http://www.comcom.govt.nz/MediaCentre/MediaReleases/200607/firsteverceaseanddesistorderissued.aspx>.

#### A. EXTRA-TERRITORIAL APPLICATION

The New Competition Law has codified provisions regarding the extra-territorial application of antimonopoly legislation. In particular, it requires foreign companies to apply to FAS for consent to transactions outside Russia if the transactions will lead to a redistribution of rights to shares (interests in charter capital) in Russian commercial organizations, or rights in respect of such organizations.

#### B. RULES FOR COMMODITIES AND FINANCIAL MARKETS<sup>134</sup>

The law incorporates the regulation of financial institutions into the general anti-monopoly law. In so doing, the New Competition Law sets down separate rules and standards for identifying whether a financial organization has a dominant position in a commodity market, and special criteria apply to determine whether transactions to which financial organizations are parties subject to control by FAS. The New Competition Law further provides that FAS is to consider cases concerning breaches of antimonopoly legislation by banks and other financial organizations in conjunction with the Central Bank and the Federal Financial Markets Service.

#### C. STATE AID

The New Competition Law makes it illegal for governmental agencies to grant selective privileges to companies operating in the market (a prohibition upon state aid). State aid may only be given for purposes specified in the New Competition Law, and only after FAS has given its consent. Permitted state assistance must not lead to the elimination or preclusion of competition in the relevant market.

#### D. PERMISSIBLE AGREEMENTS AND CONCERTED ACTION

The New Competition Law has introduced rules regarding permissible agreements and concerted action that are analogous to those in Article 81(3) of the European Community Treaty. These have been extended to specific cases of abuse of dominance, and FAS can apply them in dealing with economic concentration. Also, vertical agreements (which do not fall under the *per se* prohibition) can be declared in compliance with antimonopoly legislation under a *de minimis* rule (no party may have a market share of more than 20 percent) or by using block exemptions that are to be issued by the Russian Federation Government.

#### E. COMMODITY MARKET DOMINANCE

Provisions regarding commodity market dominance have undergone substantial modification. A company or several companies will be considered to have a dominant position in a market if: (1) up to three companies have a combined market share of over 50 percent of the relevant market, or up to five companies have a combined market share in excess of 70 percent; (2) market shares are stable and access for new competitors is limited; (3) there

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134. A commodities market includes not only tangible good, but also services and works.

are no substitutes for the product and demand is inflexible; and (4) companies' actions in setting prices and other terms of trade for the product are transparent.

#### F. MERGERS AND ACQUISITIONS

The New Competition Law considerably lessens the burden for businesses imposed by antimonopoly controls of mergers and acquisitions. Through 2004, FAS had considered more than 13,000 pre-merger notifications each year. The 150-fold rise in 2005 of the thresholds for transactions that are subject to merger control<sup>135</sup> did not lead to the substantial reduction in pre-merger notifications that FAS had originally planned. The New Competition Law attempts to rationalize FAS's burden of pre-merger notifications by removing pre-merger notification for transactions that would not affect competition (which would also spare businesses from having to delay their transactions while FAS assesses them). The FAS forecasts that the New Competition Law should result in a two- to three-fold reduction in the number of notifications submitted to the agency each year.

The New Competition Law has entirely removed some types of transactions from the ambit of FAS on the basis that they have no effect on competition. Furthermore, oversight of acquisitions of shares (interests in charter capital) in Russian economic companies is now limited to the acquisition of more than 25 percent, 50 percent, or 75 percent of shares in a joint stock company, or a blocking vote at the company's general meeting of shareholders (or participants).

In relation to acquisitions of shares in economic companies, the New Competition Law has introduced one further simplification: if shares are being acquired in a relatively small company (with assets of no more than 150 million rubles, or US\$5.6 million), such transactions are not subject to control, no matter what the total assets or turnover of the parties to the transaction are.

The New Competition Law introduces an additional turnover criterion, whereby a transaction is subject to control by FAS if the aggregate worldwide turnover of the acquirer and the target (and their respective groups) exceed 6 billion rubles (approximately US\$220 million). It is presumed that this will not lead to an appreciable rise in notifications, whilst allowing FAS to control transactions with shares (interests in charter capital) in those of the largest companies that have few assets.

An important innovation in the New Competition Law is that it directly establishes the main antimonopoly procedures—the rules for considering cases concerning breaches of antimonopoly legislation and the rules for considering applications and notifications regarding transactions. This approach by the legislature guarantees the rights of interested parties, makes the procedures more transparent and consolidates the practice of applying the anti-monopoly procedures established by the New Competition Law (including through the accumulation of relevant court experience).

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135. Thirty million times the statutory minimum wage. This has been changed to an aggregate worldwide value of the parties' (and their respective groups') assets of 3 billion rubles (approximately US\$110 million) or more, which equates to approximately the same amount.

## G. PENALTIES

The successful passage through the Russian parliament of a bill introducing more severe penalties for breaching the antimonopoly legislation will have a direct bearing upon how potent the New Competition Law will be. FAS's proposed fine (up to four percent of the offending company's turnover) should be an effective means of enforcing the New Competition Law.

## XVIII. Developments in South Africa

### A. MERGER ACTIVITY

#### 1. *Cape Empowerment Trust/Sanlam Life Insurance/Sansino*

In February 2006, the Competition Tribunal dismissed an application by Cape Empowerment Trust to restrain Sanlam from voting its preference shares in Sansino.<sup>136</sup> Cape alleged that by voting its preference shares (which were converted to voting shares in 2002), Sanlam would be implementing a merger with Sansino without a prior approval of the Competition Authorities. However, the Tribunal held that Sanlam had already acquired control of Sansino in March 1998, before the merger control provisions of the Competition Act came into force. Thus, notification of the conversion of the shares was not required.

#### 2. *Telkom Merger with BCX*

In November 2006, the Competition Commission stated that the merger between Telkom and Business Connexion (BCX) should be prohibited as it would be likely to lessen substantially competition in the information technology sector and would have a negative impact on the public interest.<sup>137</sup> Although the Commission had considered the possibility of imposing structural and behavioral remedies, it found ultimately that these would not have been able to restore effective competition if the merger went ahead.

### B. ENFORCEMENT

#### 1. *Public Inquiry into Bank Charges*

In April 2006, the Commission initiated a public inquiry under Section 21 of the Competition Act<sup>138</sup> into bank charges.<sup>139</sup> This is the first time the Commission has used its authority under the Competition Act to conduct a public inquiry. The inquiry does not

136. Competition Tribunal, South Africa, Case No. 05/X/Jan06, available at <http://www.comptrib.co.za/> (last visited Nov. 21, 2006).

137. Competition Tribunal, South Africa, Case No. 51/LM/Jun06, available at <http://www.comptrib.co.za/%5Ccomptrib%5Ccomptribdocs%5C99%5C51LMJun06%20ext.pdf> (last visited Nov. 27, 2006).

138. Competition Act 89 of 1998, as amended, available at [http://www.comptrib.co.za/comp\\_act.htm](http://www.comptrib.co.za/comp_act.htm) (last visited Nov. 27, 2006).

139. Press Release, Competition Commission, Commission's Banking Research (Apr. 20, 2006), available at <http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202006/Payment%20system/Banking%20Press%20Statement.doc>.

preclude the Commission from recommending a formal investigation if the inquiry reveals competition concerns. In fact, the Commission has suggested that a public inquiry might be the most appropriate fact finding mechanism to form the basis for a formal investigation. The inquiry was initiated as a result of consumer complaints and a request by the Department of Trade and Industry for the Commission to look into the banking sector. Public hearings were conducted in November 2006 and will continue until January 2007.

## 2. *The Commission/Motor Vehicle Manufacturers and Dealers*<sup>140</sup>

In December 2005, the Commission instituted proceedings in the Tribunal against BMW, Citroen, GM SA, Nissan, VW SA, Subaru, and DC SA for adjudication under Section 50 of the Competition Act, as a result of their alleged price fixing, minimum resale price maintenance and imposition of excessive charges on consumers for new model vehicles since 1999.<sup>141</sup> In the first quarter of 2006, the Tribunal ordered the motor vehicle manufacturers to pay administrative penalties collectively amounting to 39.65 million rand (approximately US\$5.5 million) under settlements reached with the Commission.

### C. ANTICOMPETITIVE CONDUCT

In January 2006, in *Nedschroef Johannesburg/Teamcor*,<sup>142</sup> the Tribunal held certain restraints in a business sale agreement to be an illegal division of the market under Section 4 of the Competition Act and granted an interim order restraining the parties from enforcing the restraint of trade until a final determination in the case. Nedschroef had applied to the Tribunal for interim relief from a restraint of trade which it had agreed to when it purchased its automotive fastener business from Teamcor. Under the restraint, Nedschroef and Teamcor each agreed to manufacture only specific types of fasteners. Five years later, Nedschroef wanted to produce additional fasteners in breach of the restraint and instituted proceedings in the Tribunal to challenge the restraint. The Tribunal found that Nedschroef had prima facie established a breach of Section 4(1) (which prohibits restrictive horizontal practices by parties in a horizontal relationship) because the parties in this case were competitors and had divided the market through the restrictive agreement. The Tribunal held that the Competition Act does not require firms to be prior competitors for there to be a violation of Section 4.

140. See Competition Tribunal South Africa Annual Report 2005/2006, at 27, <http://www.comptrib.co.za/Publications/Annual%20Report/Annual%20Report%202005-6.pdf> (last visited Mar. 19, 2007).

141. The highest penalties were imposed on GMSA (US\$1,664,835) DC SA (US\$1,095,890).

142. Compensation Tribunal, Case No: 95/IR/OCT05, available at <http://www.comptrib.co.za/comptrib/comptribdocs/10/95IROct05.pdf> (last visited Nov. 22, 2006).

## XIX. Developments in South Korea

### A. LEGISLATIVE DEVELOPMENTS

#### 1. *Amended Leniency Program for Voluntary Reporting of Cartels*

In 2006, the Korea Fair Trade Commission amended its leniency program for cartels in order to simplify leniency application procedures.<sup>143</sup> The amendment, which applies to leniency applications filed on or after July 1, 2006, features three key elements:

- (1) Applicants may now make oral applications for leniency, in contrast to the prior system which required submission of applications in written format.
- (2) The period during which an applicant may submit evidence after receiving a "marker" from the Commission has been extended from the prior maximum of twelve days. The period is now normally fifteen days, but an additional sixty days may be granted in extenuating circumstances.
- (3) Full leniency may now be available even after a third party has submitted relevant evidence, unless the evidence submitted by the third party is deemed sufficient standing alone to corroborate the cartel in question. Previously, a leniency applicant could qualify only for a reduction in fines of up to 30 percent if a third party had already submitted evidence sufficient to merit a monetary reward from the Commission under its Monetary Reward Program.<sup>144</sup>

#### 2. *Amended M&A Review Guidelines*

Amended procedures enacted on July 19, 2006, create a simplified and expedited review procedure for certain business combinations that are not likely to pose any significant anticompetitive risk.<sup>145</sup> The amended guidelines create "Safe Harbor" classifications based on market share of the relevant entities after the proposed business combination, which encompass horizontal, conglomerate, and vertical business combinations that satisfy certain criteria.<sup>146</sup> Under the amendment, if the resulting market share of the combined

143. See Press Release, Korea Fair Trade Commission, Amendment of Notification on Implementation Leniency Program (July 24, 2006), available at <http://www.ftc.go.kr/eng>.

144. See Press Release, Korea Fair Trade Commission, KFTC's Launch of Reward System for Investments (Apr. 14, 2005), available at <http://www.ftc.go.kr/eng>.

145. See Press Release, Korea Fair Trade Commission, Amendment of M&A Review Guidelines (July 24, 2006), available at <http://www.ftc.go.kr/eng>.

146. *Combination of Competing Companies*: In horizontal business combinations characterized by the integration of competing companies, one of the following requirements must be satisfied to qualify for simplified review: (1) after the business combination, the combined market share of the top three companies in the relevant market is less than 50% and the market share of the combined company is less than 25%; or (2) after the business combination, the combined market share of the merging companies ranks fourth or below, provided that if the combined market share of the merging companies ranks fourth, it should account for less than 75% of the third largest company's market share.

*Vertical or Conglomerate Business Combinations*: For vertical or conglomerate business combinations, one of the following requirements must be satisfied to fall under the Safe Harbor classification: (1) the combined market share of the top three companies in the area of business a combining company is engaged in is less than 50% and the company's market share is less than 25% in that area of business, and similarly the combined market share of the top three companies in the area of business the other combining company is engaged in is less

entity falls below specified thresholds, the guidelines require the Commission to notify the applicant of the outcome of its review within fifteen days after the filing. The Commission may extend the review period if there are any special considerations.

#### B. NOTEWORTHY SUPREME COURT DECISION

In a decision on March 24, 2006, the Supreme Court of Korea addressed the issue of whether the Monopoly Regulation and Fair Trade Act of Korea applied to an improper concerted action that occurred abroad and solely between foreign entities.<sup>147</sup> The case is noteworthy because it endorsed the principle of extraterritorial applications of Korean law even though the alleged illegal action took place prior to the amendment that took effect on April 1, 2005, which codified the extraterritorial application of the South Korean anti-trust laws.<sup>148</sup> The decision strengthens the ability of the Commission's enforcement arm to reach foreign cartel cases for conduct occurring prior to April 1, 2005.

#### C. MICROSOFT

In 2001 and 2004 respectively, RealNetworks and Daum Communications Corp. each filed a complaint with the Commission against Microsoft for abusing its market dominant position. In particular, RealNetworks and Daum Communications charged Microsoft with illegally bundling its PC and server operating systems with separate applications such as Windows Media Player, instant messenger programs and media server application programs. After more than four years of investigation and seven hearings in 2005, the Commission found that the tying practices by Microsoft had restrained competition and that these practices breached Korea's Monopoly Regulation and Fair Trade Act, which prohibits product tying.<sup>149</sup> The Commission fined Microsoft US\$33 million, and as a result Microsoft was required to un-bundle Windows Media Service from Windows Operating System and produce and distribute two versions of the Windows PC operating system (one version without Windows Media Player and instant messenger and another version with Media Player Center and Messenger Center). Following the decision, Microsoft filed for a preliminary injunction against the Commission. The Seoul High Court decided in favor of the Commission in July 2006.<sup>150</sup>

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than 50% and that company's market share is also less than 25%; or (2) each of the merging companies ranks fourth or below in their respective areas of business.

147. Supreme Court of Korea, Revocation of a Corrective Order 2004Du11275, [2006] KRSC 5 (Mar. 24, 2006). Summarized English version of the decision *available at* <http://www.asianlii.org/kr/cases/KRSC/2006/5.html>.

148. See Monopoly Regulation and Fair Trade Act, Dec. 31, 1980, Law No. 3320, last amended by Law. No. 7315, Dec. 31, 2004, art. 202 (S. Korea), *available at* <http://www.ftc.go.kr/eng> (follow "LAWS" hyperlink; then follow "Statutes" hyperlink).

149. Press Release, Korea Fair Trade Commission, The Findings of the Microsoft Case (Dec. 7, 2005), *available at* <http://www.ftc.go.kr/eng/>.

150. Seoul High Court Decision 2006Ah81, July 4, 2006 (decision not available online).

#### D. CARTEL ENFORCEMENT

In May 2006, the Commission imposed a fine for the first time on mobile telephone service providers for antitrust liability,<sup>151</sup> following last year's fine against Korea Telecom, a fixed network telephone service provider.<sup>152</sup> The nation's three mobile telephone service providers were fined a total of 1.78 billion South Korean won (approximately US\$1.88 million) for their participation in an improper concerted action. The unlawful action involved an agreement by the companies to limit or discontinue their flat-rate mobile phone services.

#### E. MERGER ENFORCEMENT

In September 2006, the Commission approved the proposed acquisition of the shares of Carrefour Korea by Eland Retail Co. and KDF Distribution Co. on the condition that the merged company divest a total of three stores, each in three identified geographic regions, within six months.<sup>153</sup> The conditional approval marks the first time the Commission has fashioned a structural measure to counter the competition-restraining effect of a merger. The decision is also noteworthy because the Commission analyzed the restraining effect of the merger both at the national and the regional geographic levels. In another case, in September 2006, the Commission ordered E-Mart to divest four to five stores in four regions as a condition of acquiring Wal-Mart Korea.<sup>154</sup> E-Mart is one of the largest discount retail stores in South Korea.

### XX. Developments in Spain

#### A. LEGISLATIVE DEVELOPMENTS

On August 25, 2006, the Council of Ministers (Spanish Cabinet) presented to Parliament the long-awaited Antitrust Bill.<sup>155</sup> The Bill, expected to become law in 2007, unifies the Servicio de Defensa de la Competencia (SDC) and Tribunal de Defensa de la Competencia (TDC) into a single body, the Comisión Nacional de Competencia (CNC) with greater independence (although the Council of Ministers maintains the power to veto mergers on public interest grounds). The individual exemption system is replaced by a legal exception system that requires firms to self-assess the compliance of their agreements and practices with antitrust rules. The Bill introduces a leniency program similar to EU competition law. The Commercial Courts are given jurisdiction to hear competition-related cases, and claims for damages are made easier by repealing the need to obtain a

151. See Press Release, Korea Fair Trade Commission, 13 Mobile Providers Hit with Fines for Collusion (May 19, 2006), *available at* <http://www.ftc.go.kr/eng>.

152. See Press Release, Korea Fair Trade Commission, Corrective Orders and Surcharges Imposed on Cartel Regarding Rates for Local Call Service and Internet Café Leased-Line Service (July 20, 2005), *available at* <http://www.ftc.go.kr/eng>.

153. See Press Release, Korea Fair Trade Commission, KFTC's Conditional Approval of Carrefour Korea's Shares by Eland Retail Co. (Sept. 18, 2006), *available at* <http://www.ftc.go.kr/eng>.

154. FTC Decision released on Nov. 14, 2006, #2006-264. Korean-only version *available at* <http://www.ftc.go.kr/> (last visited Jan. 31, 2007).

155. Ministerio De Economica Y Hacienda, Ley de Defensa de la Competencia, *available at* <http://documentacion.meh.es/doc/C0/Proyectos/Proyecto%20LDC%2025-08-06.pdf> (last visited Mar. 19, 2007).

final administrative decision as a pre-condition for filing suit to seek liability and damages for an infringement of the antitrust rules.

## B. MERGER CONTROL

As of October 17, 2006, more than 119 transactions had been notified to the antitrust authorities, reflecting a continued increase in the number of notified transactions compared to previous years.<sup>156</sup> Of these transactions, only five were referred to a second-phase, in-depth investigation,<sup>157</sup> and only one was prohibited.<sup>158</sup>

One of the most notable merger cases of the past year was the takeover battle for Endesa (the main electricity company) between Endesa itself, Gas Natural (the incumbent Spanish natural gas company), and E.ON (the German company). After several actions filed before different authorities and courts,<sup>159</sup> the transaction is awaiting the final decisions of both the Supreme Court of Spain and Commercial Court No. 3 of Madrid.<sup>160</sup>

The Telefónica/Iberbanda case was the only merger prohibited in 2006. In that case, the antitrust authorities were concerned about the anticompetitive effects of ancillary restraints of the merger (restrictions directly related and necessary to concentration, such as a non-compete obligation on the seller).<sup>161</sup> After the prohibition decision, the parties modified the ancillary agreements and Telefónica re-notified the transaction, which was cleared following a first-phase procedure in May 2006.<sup>162</sup>

156. See Servicio de Defensa de la Competencia, Expedientes de Control de Concentraciones, available at [http://www.dgdc.meh.es/control\\_concentra.html](http://www.dgdc.meh.es/control_concentra.html) (last visited Nov. 28, 2006).

157. See the following decisions of the Council of Ministers: October 20, 2006, *Universal Music/Vale Music*; October 20, 2006, *Abacocine/Cinebox*; September 29, 2006, *Abertis Telecom/Revisión I*; July 14, 2006 *Transmediterránea/Europa Ferrys/Viajes Eurotras*; July 7, 2006, *Cofares/Hefame*; May 19, 2006, *Miquel Alimentació/Puntocash*; February 2, 2006, *Gas Natural/Endesa*; January 27, 2006, *Telefónica/Iberbanda*; January 27, 2006, *Unión Radio/Antena 3 Radio*; January 13, 2006, *Dinosol/Supermercado Mercacentro*. Each decision is available at [http://www.dgdc.meh.es/control\\_concentra.htm](http://www.dgdc.meh.es/control_concentra.htm).

158. Acuerdo de Consejo de Ministros [Council of Ministers], Jan. 27, 2006 (B.O.E., 3034, p. 7086), available at <http://www.dgdc.meh.es/Acuerdos%20Consejo%20Ministros/N05090ACMWEB.pdf>.

159. Endesa lodged an appeal before the Court of First Instance of the European Union against a Commission Decision declining Community jurisdiction over the transaction. The appeal was dismissed. See Commission of the European Communities, Commission Decision of Nov. 15, 2005, Case No. COMP/M. 3996—*Gas Natural/Endesa (C4468)* available at [http://ec.europa.eu/comm/competition/mergers/cases/additional\\_data/m3986\\_en.pdf](http://ec.europa.eu/comm/competition/mergers/cases/additional_data/m3986_en.pdf); Case T-417/05, *Endesa, S.A. v. Comm'n*, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (input "T-417/05" in the "case number" field and submit query).

160. See STS [Tribunal Supremo] [Supreme Court], 1o contencioso, Apr. 28, 2006, available at [http://www.poderjudicial.es/jurisprudencia/pdf/28079130012006204678.pdf?formato=pdf&K2DocKey=e:\Sentencias\20060914\28079130012006204678.xml@sent\\_supremo&query=%28%3CYESNO%3E%2847%2F2006%3CIN%3Enumero\\_recurso%29%29;](http://www.poderjudicial.es/jurisprudencia/pdf/28079130012006204678.pdf?formato=pdf&K2DocKey=e:\Sentencias\20060914\28079130012006204678.xml@sent_supremo&query=%28%3CYESNO%3E%2847%2F2006%3CIN%3Enumero_recurso%29%29;) STSJ [Tribunal Superior de Justicia] [regional high court], Madrid, 3o contencioso, Mar. 17, 2006, available at [http://www.poderjudicial.es/jurisprudencia/pdf/28079330032006100199.pdf?formato=pdf&K2DocKey=e:\Sentencias\20060518\28079330032006100199.xml@sent\\_public&query=%28%3CYESNO%3E%28523%2F2005%3CIN%3Enumero\\_recurso%29%29;](http://www.poderjudicial.es/jurisprudencia/pdf/28079330032006100199.pdf?formato=pdf&K2DocKey=e:\Sentencias\20060518\28079330032006100199.xml@sent_public&query=%28%3CYESNO%3E%28523%2F2005%3CIN%3Enumero_recurso%29%29;)

161. See Acuerdo de Consejo de Ministros [Council of Ministers], Jan. 27, 2006 (B.O.E., 3034, p. 7086), available at <http://www.dgdc.meh.es/Acuerdos%20Consejo%20Ministros/N05090ACMWEB.pdf>.

162. See MINISTERIO DE ECONOMÍA Y HACIENDA, INFORME DEL SERVICIO DE DEFENSA DE LA COMPETENCIA: N-06038 TELEFÓNICA/IBERBANDA (2006), <http://www.dgdc.meh.es/Informes%20SGC/N06038INFWEB.pdf> (last visited Mar. 19, 2007).

### C. CONDUCT CASES

As of October 17, 2006, the number of resolutions adopted in anticompetitive practices cases continues to fall, with a total of sixty-eight resolutions having been made in 2006, as compared with eighty-seven in 2005.

In the *Distribuidores Cines* case, the TDC imposed a fine of 2.4 million euros (approximately US\$3.2 million) on major American film distributors.<sup>163</sup> It found that between 1998/99 and 2004 the five major film distributors had coordinated their commercial policies and contracts with film exhibitors. The Spanish film distribution trade association, FEDICINE, was also fined 900,000 euros (approximately US\$1.2 million) for its involvement in the creation of a joint database facilitating sensitive information exchange. In another case, *FLAB/Grandes Superficies*,<sup>164</sup> large retailers El Corte Inglés, Alcampo, and Carrefour were each fined 75,000 euros (approximately US\$100,000) for jointly requiring their alcoholic drink suppliers to set up anti-theft label systems on products more likely to be stolen.

In the *Planes Claros* case, the Spanish Supreme Court annulled a decision of the TDC which imposed a record fine on Telefónica, S.A.<sup>165</sup> While the TDC found that Telefónica had abused its dominant position in the voice telephony market by launching an advertising campaign aimed at jeopardizing a new entrant, Retevisión, the Supreme Court held that such conduct was a legitimate reaction to a new competitive environment and that the restrictive intention is not in itself unlawful, provided it is put into practice through legitimate means.

## XXI. Developments in Taiwan

### A. LEGISLATIVE DEVELOPMENTS

The Fair Trade Law is Taiwan's primary legislation addressing antitrust issues, including monopolistic conduct, combinations (mergers), and concerted actions. After a major revision of the Fair Trade Law in 2002,<sup>166</sup> which brought many aspects of the current regime into place, 2006 has been largely a year of implementation and enforcement.

Since 2004, the Fair Trade Commission (FTC) has internally discussed and proposed a few drafts of proposed partial amendments to the Fair Trade Law. In April 2006, the FTC made available to the public another draft bill of proposed amendments to the Fair Trade Law for comment.<sup>167</sup> There are two key aspects worth noting: (1) a proposal to remove market share as one of the criteria determining the thresholds for requiring

163. STDC [Tribunal de Defensa de la Competencia], May 10, 2006 (No. 588/05), available at <http://www.tdcompetencia.es/html/resoluciones/2006/2097.htm>.

164. STDC [Tribunal de Defensa de la Competencia], May 22, 2006 (No. 589/05), available at <http://www.tdcompetencia.es/html/resoluciones/2006/2103.htm>.

165. Spanish Supreme Court judgment of June 20, 2006, appeal no. 9174/2003, annulling the TDC Resolution of Mar. 8, 2000, Case 456/99, *Retevisión/Telefónica*. The TDC Resolution is available at <http://www.tdcompetencia.es/PDFs/resoluciones/2000/1410.pdf>.

166. Fair Trade Act (promulgated Feb. 4, 1991, eff. Feb. 4, 1992), last amended Feb. 6, 2002, available at <http://www.ftc.gov.tw/EnglishWeb/20000101299901011508.htm>.

167. Draft bill in Mandarin Chinese available at <http://www.ftc.gov.tw/talk/Detail.asp?TitleID=50&name=&passed=> (last visited on Nov. 3, 2006). Although made publicly available, this is still an agency internal study.

merger filings; and (2) the introduction of a leniency policy and exemptions for certain types of concerted actions modeled upon the U.S.-styled "Antitrust Safety Zone" and the European-styled "Block Exemptions." This draft bill has not drawn a lot of public attention, and there is no known schedule as to when it might become legislation.

## B. CONDUCT ENFORCEMENT

According to the FTC's announced statistics, as of the end of September 2006, the FTC has rendered fifteen administrative decisions against anti-competitive conduct and 113 against unfair trading practices.<sup>168</sup> It is worth noting that the majority of the cases against anticompetitive conduct related to concerted actions; far fewer were related to monopolistic conduct or mergers.

During this period, the FTC rendered decisions in a total of ten cases against unauthorized concerted actions. One of the most noteworthy cases is the long-standing investigation of the two major Taiwanese petroleum companies for acting in concert in raising (and lowering) the price of petroleum.<sup>169</sup> In July 2005, after a few years of investigation, the FTC rendered a decision and fined both China Petroleum and Formosa Petrochemical, the two largest Taiwanese petroleum companies, for acting in concert in raising (and lowering) the price of petroleum by the same amounts and at the same time on more than twenty occasions. Both companies brought administrative appeals challenging the FTC decision.<sup>170</sup> No decision on the appeals has been reached yet.

This past year, in a meeting held on March 30, 2006, the FTC commissioners resolved that, although the two companies have not engaged in additional unauthorized concerted action since the 2005 fine, the FTC would closely monitor subsequent price adjustments and continue to warn the two companies of the FTC's position towards oligopoly and its determination to enforce antitrust laws.<sup>171</sup>

## C. MERGER ENFORCEMENT

The year 2006 has been a lively one for Taiwan in mergers and acquisitions compared to recent years. Most of the largest announced mergers and acquisitions involve the domestic cable and media industries. In 2006, the FTC reviewed a total of fifty-seven merger filings, twenty-five of which were determined not prohibited, and the rest of which either did not require application or remain undetermined due to incomplete applications. Two notable mergers approved by the FTC in 2006, both involving the cable industry, are (1) Macquarie Media International's US\$883 million acquisition of Taiwan Broadband Communication Corp., one of the three largest cable systems providers in Taiwan (March 2006),<sup>172</sup> and (2) Carlyle's US\$1.5 billion acquisition of a majority share-

168. FAIR TRADE COMMISSION, CASES RECEIVED: STATISTICS (2006), <http://www.ftc.gov.tw/EnglishWeb/20000101299912311138.htm> (last visited Mar. 19, 2007).

169. FTC, Taiwan, Disposition No. 094079 (2005).

170. Exec. Yuan Admin. Appeal Case Nos. 0950080966, 0950080991.

171. FAIR TRADE COMMISSION, MINUTES OF THE 751ST COMMISSIONERS' MEETING (2006), [http://www.ftc.gov.tw/FTC\\_ADDS/upload/2005282/0950330\\_001\\_751\\_%AC%F6%BF%FD%28%A4%BD%B3%F8%29.pdf](http://www.ftc.gov.tw/FTC_ADDS/upload/2005282/0950330_001_751_%AC%F6%BF%FD%28%A4%BD%B3%F8%29.pdf) (last visited Mar. 19, 2007).

172. *Id.*

holding in Eastern Multimedia, the largest cable systems provider in Taiwan (June 2006).<sup>173</sup>

On July 6, 2006, the FTC announced its internal "Handling Principles for Combination Filing" aiming to provide clearer guidelines on the FTC's review standards in merger cases. The key points of the new Handling Principles include: (1) dividing the handling process into a simplified process and a general process, and specifying the types of combination to which a simplified process may apply; (2) providing additional definition on "specific market" and calculating market share; (3) specifying factors to be considered in assessing anticompetitive effects of both horizontal and vertical combinations, and the review principles for diversified combination; and (4) specifying the factors to be considered in determining "benefit to the overall economy."

## XXII. Developments in The United Kingdom

### A. LEGISLATIVE DEVELOPMENTS

In 2006, the U.K. Office of Fair Trading (OFT) announced it will resume providing informal advice concerning mergers, but in more limited circumstances for good faith confidential transactions and for those transactions that are likely contenders for reference to the Competition Commission.<sup>174</sup> The OFT also issued new guidelines setting forth the circumstances in which the OFT will provide complainants and other third parties with an opportunity to comment on its provisional findings before the conclusion of an investigation.<sup>175</sup> Further, the OFT developed a framework under which competition cases will be prioritized in the future.<sup>176</sup> For its part, the Competition Commission outlined how the Commission will use its discretion under Part 9 of the 2002 Enterprise Act when considering the disclosure of specified information received during merger or market inquiries to another body carrying out statutory functions, such as the OFT.<sup>177</sup>

### B. CARTEL/CRIMINAL ENFORCEMENT

The Serious Fraud Office (SFO) brought criminal proceedings against nine individuals and five companies alleging conspiracy to defraud the National Health Service in connection with the pricing and supply of warfarin- and penicillin-based antibiotics between Jan-

173. *Id.*

174. OFFICE OF FAIR TRADING, INTERIM ARRANGEMENTS FOR INFORMAL ADVICE AND PRE-NOTIFICATION CONTACTS (2006), available at [http://www.oft.gov.uk/shared\\_of/business\\_leaflets/general/informal.pdf](http://www.oft.gov.uk/shared_of/business_leaflets/general/informal.pdf) (last visited Mar. 19, 2007).

175. OFFICE OF FAIR TRADING, INVOLVING THIRD PARTIES IN COMPETITION ACT INVESTIGATIONS (2006), available at [http://www.oft.gov.uk/shared\\_of/business\\_leaflets/ca98\\_guidelines/oft451resp.pdf](http://www.oft.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft451resp.pdf) (last visited Mar. 19, 2007).

176. OFFICE OF FAIR TRADING, COMPETITION PRIORITISATION FRAMEWORK (2006), available at [http://www.oft.gov.uk/shared\\_of/press\\_release\\_attachments/compcriteria.pdf](http://www.oft.gov.uk/shared_of/press_release_attachments/compcriteria.pdf) (last visited Mar. 19, 2007).

177. COMPETITION COMMISSION, DISCLOSURE OF INFORMATION BY THE COMPETITION COMMISSION TO OTHER PUBLIC AUTHORITIES (2006), available at [http://www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/pdf/cc12.pdf](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc12.pdf) (last visited Mar. 19, 2007).

uary 1996 and December 2000.<sup>178</sup> This is the first time in the United Kingdom that companies have faced criminal charges with respect to cartel conduct.

The OFT imposed fines for price fixing and other cartel conduct in three decisions, including stock check pads,<sup>179</sup> roofing contractors,<sup>180</sup> and double glazing.<sup>181</sup> The OFT also launched criminal and civil investigations into alleged price-fixing by British Airways and Virgin Atlantic concerning fuel surcharges for long-haul passenger flights to and from the United Kingdom.<sup>182</sup> The investigation has already resulted in the resignation of two senior British Airways employees.<sup>183</sup> Finally, British executive Ian Norris continued his legal battle against extradition to the United States on price-fixing charges in the carbon industry by bringing an appeal in the High Court in October 2006.<sup>184</sup> On January 25, 2007, two High Court judges rejected Norris' appeal.<sup>185</sup> Norris is likely to seek an appeal to the House of Lords.

### C. MERGER ENFORCEMENT

The Competition Appeal Tribunal (CAT) dismissed Celesio's appeal of the OFT's decision not to refer the proposed merger between Boots Group plc and Alliance Unichem plc to the Competition Commission.<sup>186</sup> This was the first time the CAT has upheld an OFT decision not to refer a merger. Additionally, the Competition Commission provisionally blocked a merger between the two largest clinical waste services firms in Great Britain.<sup>187</sup> This is the first time the Competition Commission has ordered companies under investigation to unwind and cease any further integration.

178. See Press Release, Serious Fraud Office, Fraud on the National Health Service/Appeal at Magistrates Court (Apr. 27, 2006), available at [http://www.sfo.gov.uk/news/prout/pr\\_466.asp?id=466](http://www.sfo.gov.uk/news/prout/pr_466.asp?id=466).

179. Office of Fair Trading, Decision on price fixing and market sharing in stock check pads, Mar. 31, 2006 (No. CE/3861-04), [http://www.offt.gov.uk/shared\\_offt/ca98\\_public\\_register/decisions/stockcheckpads.pdf](http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/stockcheckpads.pdf) (last visited Mar. 19, 2007).

180. Office of Fair Trading, Decision on collusive tendering for flat roof and car park surfacing contracts in England and Scotland, Feb. 22, 2006 (No. CA98/01/2006), available at [http://www.offt.gov.uk/shared\\_offt/ca98\\_public\\_register/decisions/flatroof.pdf](http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/flatroof.pdf).

181. Office of Fair Trading, Decision on agreement to fix prices and share the market for aluminum double glazing spacer bars, June 28, 2006 (No. CA98/04/2006), available at [http://www.offt.gov.uk/shared\\_offt-ca98\\_public\\_register/decisions/spacerbars.pdf](http://www.offt.gov.uk/shared_offt-ca98_public_register/decisions/spacerbars.pdf).

182. Press Release, Office of Fair Trading, OFT Investigation into Alleged Price Coordination in Relation to Long Haul Passenger Flights to and from the UK (June 22, 2006), available at <http://www.offt.gov.uk/news/press/2006/airlines>.

183. See Press Release, British Airways, Commercial Director Resigns (Oct. 9, 2006), available at [http://www.britishairways.com/travel/bapress/public/en\\_gb](http://www.britishairways.com/travel/bapress/public/en_gb).

184. Richard Wachman, *British Boss Fighting US Extradition*, THE OBSERVER (London), Oct. 15, 2006, available at <http://business.guardian.co.uk/story/0,,1922992,00.html>.

185. Nikki Tait, *High Court Upholds Norris Extradition*, FINANCIAL TIMES (London), Jan. 25, 2007, available at [http://www.ft.com/cms/s/8bf56a18-acc7-11db-9318-0000779e2340,\\_i\\_rssPage=4e612cca-6707-11da-a650-0000779e2340.html](http://www.ft.com/cms/s/8bf56a18-acc7-11db-9318-0000779e2340,_i_rssPage=4e612cca-6707-11da-a650-0000779e2340.html).

186. Celesio AG v. Office of Fair Trading, [2006] CAT 9, available at <http://www.catribunal.org.uk/documents/Jdg1059Celesio090506.pdf> (last visited Mar. 19, 2007).

187. See COMPETITION COMMISSION, PROVISIONAL FINDINGS REPORT: ACQUISITION OF STERILE TECHNOLOGIES GROUP LTD. BY STERICYCLE INTERNATIONAL LLC (2006), available at [http://www.competition-commission.org.uk/inquiries/ref2006/stericycle/provisional\\_findings.htm](http://www.competition-commission.org.uk/inquiries/ref2006/stericycle/provisional_findings.htm); and [http://www.competition-commission.org.uk/rep\\_pub/reports/2006/519stericycle.htm](http://www.competition-commission.org.uk/rep_pub/reports/2006/519stericycle.htm) (last visited Mar. 19, 2007).

#### D. MARKET STUDIES AND INVESTIGATIONS

The OFT began market studies into internet shopping,<sup>188</sup> the U.K. airports market,<sup>189</sup> and payment protection insurance.<sup>190</sup> It also investigated the UK school uniform market.<sup>191</sup>

The OFT referred the U.K. retailers' supply of groceries to the Competition Commission.<sup>192</sup> The Competition Commission identified a lack of competition in the market for Classified Directory Advertising Services and set out a remedies package to address its findings.<sup>193</sup>

By concluding its investigation into store cards, the Competition Commission completed its first market investigation under the Enterprise Act 2002.<sup>194</sup> The Competition Commission's final report confirmed an adverse effect on competition in the supply of consumer credit through store cards and associated insurance in the United Kingdom.

#### E. CONDUCT CASES

For the first time, the OFT published details of a case where remedies were negotiated after a statement of objections had already been issued to the parties involved.<sup>195</sup> The case concerned an agreement among fifty schools to exchange fee information. Each school paid a nominal penalty of 10,000 British pounds (approximately US\$20,000) and also agreed to make an ex-gratia payment totaling 3 million British pounds (approximately US\$6 million) into an educational, charitable trust to benefit the pupils who attended the schools during the academic years in issue.

In another case, the OFT used its power under Section 35 of the 1998 Competition Act, for the first time, to issue an immediate stop order against a company alleged to be infringing the competition rules. Recognizing that one of the affected parties, Spectron, could be eliminated from the market before the OFT's investigation into the alleged infringement could be completed, the OFT took interim measures preventing the London Metal Exchange from extending its hours until the investigation was complete.<sup>196</sup>

188. See Office of Fair Trading, Studies—internet shopping, *available at* [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/internet](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/internet) (last visited Mar. 19, 2007).

189. See Office of Fair Trading, UK AIRPORTS (2006), *available at* [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/airports](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/airports) (last visited Mar. 19, 2007).

190. OFFICE OF FAIR TRADING, PAYMENT PROTECTION INSURANCE: REPORT ON THE MARKET STUDY AND PROPOSED DECISION TO MAKE A MARKET INVESTIGATION REFERENCE (2006), *available at* [http://www.offt.gov.uk/shared\\_offt/reports/financial\\_products/offt869.pdf](http://www.offt.gov.uk/shared_offt/reports/financial_products/offt869.pdf) (last visited Mar. 19, 2007).

191. OFFICE OF FAIR TRADING, SUPPLY OF SCHOOL UNIFORMS REVIEW: REPORT OF GfK NOP FINDINGS (2006), *available at* [http://www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/offt865.pdf](http://www.offt.gov.uk/shared_offt/reports/consumer_protection/offt865.pdf) (last visited Mar. 19, 2007).

192. See Competition Commission, Groceries Market Inquiry, *available at* <http://www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm> (last visited Nov. 28, 2006).

193. See Competition Commission, Classified Directory Advertising Services Inquiry, *available at* <http://www.competition-commission.org.uk/inquiries/ref2005/classdirec/index.htm> (last visited Nov. 28, 2006).

194. COMPETITION COMMISSION, STORE CARDS MARKET INVESTIGATION (2006), *available at* [http://www.competition-commission.org.uk/rep\\_pub/reports/2006/fulltext/final\\_report.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2006/fulltext/final_report.pdf) (last visited Mar. 19, 2007).

195. See Press Release, Office of Fair Trading, Independent Schools Agree Settlement (May 19, 2006), *available at* <http://www.offt.gov.uk/news/press/2006/88-06.htm>.

196. See Press Release, Office of Fair Trading, OFT Intervenes to Prevent LME Squeezing Competition (Feb. 28, 2006), *available at* <http://www.offt.gov.uk/news/press/2006/39-06.htm>.

## F. ANTITRUST COURT DECISIONS

There were a number of important antitrust judicial decisions in 2006. In particular:

- The House of Lords overruled a 2004 Court of Appeal decision that had been the first U.K. case to award damages for breach of competition law in the “beer ties” litigation.<sup>197</sup>
- The Court of Appeal found in favor of the OFT in three linked cases relating to price fixing in the toys and games market and in the supply of replica football kits.<sup>198</sup>
- Littlewoods, Argos, and JJB Sports face fines of 4.5 million British pounds (approximately US\$8.9 million), 15 million British pounds (approximately US\$29.5 million), and 6.7 million British pounds (approximately US\$13.2 million), respectively.
- The CAT set aside a decision of the OFT which held that members of the MasterCard UK Member Forum Limited and other MasterCard licensees in the United Kingdom had been party to a restrictive agreement concerning multilateral interchange fees.<sup>199</sup>
- The first “follow-on” claim for damages under Section 47A of the Competition Act of 1998 was made in the United Kingdom by Healthcare at Home (HH).<sup>200</sup> HH’s damages claim arose from a decision of the OFT, upheld on appeal by the CAT, that HH had been subject to an illegal margin squeeze that amounted to an abuse of the dominant position held by its supplier, Genzyme. The case is currently before the CAT.

## XXIII. Developments in The United States

## A. LEGISLATIVE DEVELOPMENTS

The Antitrust Modernization Commission (AMC)<sup>201</sup> continued its assessment of the need for reform of the antitrust laws and procedures in areas including merger remedies, merger enforcement, antitrust exemptions, and “New Economy” issues. The AMC plans to submit its Final Report to Congress and the President, which will include recommendations for legislative or administrative action, in April 2007.

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) conducted a series of joint public hearings between June and December 2006 that explored how best to identify and remedy single-firm anticompetitive exclusionary conduct under Section 2

197. *Inntrepreneur Pub Co. (CPC) v. Crehan*, [2006] UKHL 38 (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060719/crehan-1.htm> (last visited Mar. 19, 2007).

198. *Argos Ltd. & Anor v. Office of Fair Trading*, [2006] EWCA Civ 1318, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1318.html> (last visited Mar. 19, 2007).

199. *MasterCard UK Members Forum Ltd. v. Office of Fair Trading*, [2006] CAT 14, available at <http://www.catribunal.org.uk/documents/Jdg105456MC100706.pdf> (last visited Mar. 19, 2007).

200. *Healthcare at Home Ltd. v. Genzyme Ltd.*, 1060/5/7/06 (Competition App. Trib.), available at <http://www.catribunal.org.uk/documents/Notice1060HH130406.pdf> (last visited Mar. 19, 2007).

201. The AMC was created in 2002 pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856 (2002).

of the Sherman Act.<sup>202</sup> The USA PATRIOT Improvement and Reauthorization Act of 2005 (effective March 9, 2006) explicitly added antitrust violations under the Sherman Act as predicate offenses that can be investigated, by order of a federal district court, with the use of wiretaps, bugs, or other electronic surveillance.<sup>203</sup>

## B. CONDUCT CASES

In its October 2005 term, the U.S. Supreme Court heard three antitrust cases, each of which resulted in reversals or the vacating of judgments in favor of private plaintiffs. In *Illinois Tool Workers, Inc. v. Independent Ink*,<sup>204</sup> the Court held that, because a patent does not necessarily confer market power upon the patentee, in all cases involving a "tying arrangement," the plaintiff must prove that the defendant has market power in the tying product. In *Texaco Inc. v. Dagber*,<sup>205</sup> the Court unanimously held that it is not *per se* illegal for two companies, as part of a lawful, economically integrated joint venture, to set the prices at which it sells the joint venture's product. The Court found that the two companies comprising the joint venture should be regarded as a single firm competing with other sellers, and thus the joint venture's pricing policy was unilateral conduct not subject to Section 1 scrutiny. In a third case, involving "secondary-line" price discrimination, the Court ruled that a manufacturer cannot be held liable under the Robinson-Patman Act for offering varying discounts to dealers with respect to bids on contracts as to which they were not competitors.<sup>206</sup>

The Supreme Court has heard argument on an appeal from a Second Circuit case to consider the standard required by Federal Rule of Civil Procedure 8(a) for pleading horizontal price-fixing claims subject to Section 1 of the Sherman Act.<sup>207</sup> The Ninth Circuit Court of Appeals held that allegations of parallel conduct are sufficient to survive dismissal, and plaintiffs are not required to plead "plus factors." The Supreme Court also granted certiorari in the predatory purchasing case reported in the 2005 Year in Review.<sup>208</sup> Decisions in both cases are expected in 2007.

There were also a number of cases of note in the lower courts in 2006. In *Kristian v. Comcast Corp.*, the First Circuit Court of Appeals rejected the use of private arbitration clauses to restrict the availability of class actions and to foreclose the possibility of plaintiffs recovering treble damages and attorneys' fees.<sup>209</sup> In a predatory pricing case involving the airline industry, the Sixth Circuit Court of Appeals overturned the decision of the district court and found that, based on the evidence in the summary judgment record relating to airline fares on two geographic routes, a reasonable trier of fact could find

202. See generally Public Hearings: Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct as Related to Competition, available at <http://www.ftc.gov/os/sectiontwohearings> (last visited Mar. 19, 2007).

203. 18 U.S.C.A. § 2516(1)(q) (West 2007).

204. 126 S. Ct. 1281 (2006) (vacating the decision of the Federal Circuit, which had held that a patent created such a presumption of market power).

205. 126 S. Ct. 1276 (2006).

206. *Volvo Trucks N. Am., Inc. v. Reeder-Simco, GMC, Inc.*, 546 U.S. 164 (2006).

207. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99 (2d Cir. 2005), cert. granted, 126 S. Ct. 2965 (2006).

208. See *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005), cert. granted, 126 S. Ct. 2965 (2006).

209. *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

there was evidence to establish predatory pricing and other predatory conduct by Northwest Airlines in a narrowly-defined "leisure passenger airline market."<sup>210</sup> In *Schor v. Abbott Laboratories*, the Seventh Circuit Court of Appeals held that "monopoly leveraging"—the use of monopoly power in one market to improve a company's position in a related market—did not violate Section 2 of the Sherman Act.<sup>211</sup>

Federal agencies also issued some noteworthy guidance in 2006. In August, the FTC issued a decision in the area of standard setting, finding that Rambus, a developer and licensor of computer memory technologies, deceived an industry-standard-making organization by not disclosing its intention to obtain patents involved in the proposed standard, and as a result, monopolized several memory technology markets. The FTC concluded that the company's failure to disclose its patent intentions distorted the standard-setting process and constituted "exclusionary conduct" in violation of Sherman Act Section 2.<sup>212</sup> In October 2006, the Antitrust Division of the DOJ issued a Business Review Letter stating that it has no present intention of challenging a standard-setting organization's proposed policy that would require participants in a standard-setting process to disclose patents that are essential to implementing a new standard.<sup>213</sup>

### C. CARTEL/CRIMINAL ENFORCEMENT

In 2006, the Antitrust Division of the DOJ continued to work in concert with antitrust officials in other countries to prosecute international cartels aggressively<sup>214</sup> (for example, the multi-jurisdictional investigation of the airline cargo industry, and a related investigation into surcharges the airlines have imposed for fuel, added security, and higher war-risk insurance).<sup>215</sup> Additionally, the Division's investigation into alleged price-fixing in the dynamic random access memory (DRAM) market continued in 2006, resulting in significant corporate fines and indictments.<sup>216</sup> The Division is also currently investigating the

210. *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005). On October 2, 2006, the Supreme Court refused to allow Northwest to appeal the decision of the Sixth Circuit "out of time," as the petition for review was untimely filed (five days late) by Northwest's counsel and had been removed from the Court's docket.

211. *Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir. 2006).

212. See *In re Rambus, Inc.*, 2006 F.T.C. LEXIS 60 (Dkt. No. 9302), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

213. See Letter from Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, to Robert A. Skitol (Oct. 30, 2006), available at <http://www.usdoj.gov/atr/public/busreview/219380.pdf>.

214. See generally Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Charting New Waters in International Cartel Prosecutions, Presentation Before the National Institute on White Collar Crime (Mar. 2, 2006), transcript available at <http://www.usdoj.gov/atr/public/speeches/214861.pdf>.

215. See, e.g., Heather Timmons, *Inquiry Looking into Airline Price-Fixing*, N.Y. TIMES, June 23, 2006, at C3; Paul Meller, *International Business: Big Airlines Raided in Cargo Price-Fixing Inquiry*, N.Y. TIMES, Feb. 15, 2006, at C9.

216. See Press Release, Dep't of Justice, Three Executives Indicted for their Roles in the DRAM Price-Fixing & Bid-Rigging Conspiracy (Oct. 18, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/219102.htm](http://www.usdoj.gov/atr/public/press_releases/2006/219102.htm). In all, four companies and 16 individuals have been charged and fines totaling more than \$731 million have resulted from this ongoing investigation.

static random access memory (SRAM) industry, and has served several subpoenas on companies from the United States, Japan, and South Korea.<sup>217</sup>

One judicial decision of the past year shed new light on the Division's criminal enforcement powers. In *Stolt-Nielsen, S.A. v. United States*,<sup>218</sup> the Third Circuit Court of Appeals reversed the district court and held that the Division could criminally indict a company previously granted conditional amnesty when the company allegedly had not yet discontinued its participation in the alleged cartel at the time that it made its amnesty application. This case marked the first time that a company had been ousted from the Division's amnesty program.<sup>219</sup> The Supreme Court recently denied certiorari in this case.

#### D. MERGER ENFORCEMENT

In the first application of the amended Tunney Act,<sup>220</sup> a district judge in the District of Columbia refused to approve the proposed consent decrees for the two completed mergers of telecommunications companies AT&T/SBC and Verizon/MCI without additional information.<sup>221</sup> The Judge required that the parties and the Division produce evidence that the consent decrees are in the public interest.

Subsequently, the Division declined to impose any conditions on AT&T's purchase of BellSouth.<sup>222</sup> The Federal Communications Commission is currently reviewing the merger, and a final decision is expected in early 2007.<sup>223</sup> The Division also announced that wireless technology developer Qualcomm Inc. has agreed to pay civil penalties of \$1.8 million to resolve charges that it had violated the pre-merger waiting period requirements of Section 7A of the Hart-Scott-Rodino Act in connection with its acquisition of Flarion Technologies Inc.<sup>224</sup> In particular, the companies were said to have engaged in illegal "gun-jumping," because the companies' merger agreement required Flarion to seek

217. See, e.g., Martin Fackler, *Sony Discloses U.S. Antitrust Investigation Over Chips*, N.Y. TIMES, Nov. 1, 2006, at C2 (noting that Sony is the fifth company to receive a subpoena as part of the Division's ongoing SRAM investigation).

218. 442 F.3d 177 (3d Cir. 2006), *rev'g* 352 F. Supp. 2d 553 (E.D. Pa. 2005). In September 2006, Stolt-Nielsen S.A., two subsidiaries, and two former executives were indicted for participating in a conspiracy to allocate customers, fix prices, and rig bids on contracts of affreightment in the parcel tanker shipping industry.

219. See Press Release, Dep't of Justice, *Stolt-Nielsen S.A. Indicted on Customer Allocation, Price Fixing, and Bid Rigging Charges for its Role in an International Parcel Tanker Shipping Cartel* (Sept. 6, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/218199.htm](http://www.usdoj.gov/atr/public/press_releases/2006/218199.htm).

220. 15 U.S.C.A. § 16 (2006).

221. See *United States v. SBC Commc'ns, Inc.*, 2006 WL 2175337 (D.D.C. July 28, 2006); Stephen Labaton, *Quick Approval of Phone Deals Uncertain*, N.Y. TIMES, July 13, 2006, at C9.

222. Press Release, Dep't of Justice, *Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of BellSouth: Investigation Concludes that Combination Would Not Reduce Competition* (Oct. 11, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/218904.htm](http://www.usdoj.gov/atr/public/press_releases/2006/218904.htm).

223. See Public Notice, Fed. Commc'ns Comm'n, *Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation: Commission Seeks Comment on Proposals Submitted by AT&T Inc. and BellSouth Corporation* (Oct. 13, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-06-2035A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-2035A1.pdf).

224. See Press Release, Dep't of Justice, *Qualcomm and Flarion Charged with Illegal Premerger Coordination: Communications Technology Companies Required to Pay \$1.8 Million Civil Penalty* (Apr. 13, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/215617.htm](http://www.usdoj.gov/atr/public/press_releases/2006/215617.htm).

Qualcomm's consent prior to undertaking certain basic business activities, such as making new proposals to customers and hiring new employees.<sup>225</sup>

The FTC approved a final consent order that largely dissolved a consummated merger between Hologic Inc. and Fischer Imaging Corporation because of concerns that the merger would eliminate competition in the production and sale of stereotactic breast biopsy systems.<sup>226</sup> This was unusual both because Hologic's acquisition of Fischer's assets was not reportable under the Hart-Scott-Rodino Act and because the consent order dissolved a previously consummated merger.

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225. *Id.*

226. *See In re Hologic, Inc.*, 2006 F.T.C. LEXIS 45 (Dkt. No. C-4165), *available at* <http://www.ftc.gov/os/caselist/0510263/0510263decisionandorderpubrecver.pdf> (last visited Mar. 19, 2007).